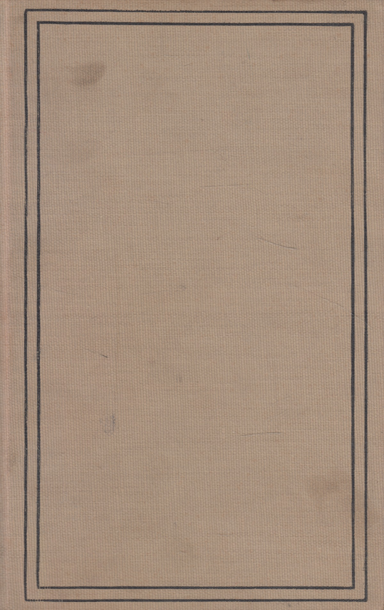


CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

APRIL 1, 1943, TO SEPTEMBER 30, 1943

WITH

REPORT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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*Effective July 31, 1943.

[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.

[2] On leave as of September 22, 1943, with War Food Administration.

[3] On military leave, as of October 20, 1942; major, U. S. Army, on active duty.

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[PUBLIC LAW 83—78TH CONGRESS]

[CHAPTER 135—1ST SESSION]

[H. R. 1947]

AN ACT

To extend the time within which a suit or suits may be brought under the Act of June 28, 1938 (52 Stat. 1209).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time within which a suit or suits may be brought under the Act entitled "An Act conferring jurisdiction upon the United States Court of Claims to hear, examine, adjudicate, and render judgment on any and all claims which the Ute Indians or any tribe or band thereof may have against the United States and for other purposes," approved June 28, 1938 (52 Stat. 1209), be, and the same hereby is, extended until December 31, 1946.

Approved June 22, 1943.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1943, to September 30, 1943, and other cases not heretofore published.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA v. THE UNITED STATES

[No. 33642. Decided April 6, 1942]*

On the Proofs

Patents; improvements in wireless telegraphy; validity and infringement; judgment upon commissioner's report as to accounting; Lodge patent #609,154.—Upon the basis of the special findings of fact and the opinion of the Court of Claims in the instant case, filed November 4, 1935 (81 C. Cls. 671), in which it was held that the Lodge patent, #609,154, was valid as to claims 1, 2, and 5, and had been infringed by the Government; and upon the showing made in the hearing for an accounting, in accordance with said opinion; it is *held* that the plaintiff is entitled to recover as just and reasonable compensation 10 per cent of the entire market value of the apparatus acquired during the accounting period, together with an amount measured by interest at 5 per cent per annum, not as interest but as a part of the entire just compensation, on said 10 per cent from August 16, 1915, to date of payment of the judgment.

Same; basis for accounting.—The status of a patent in the art with which it is associated is of importance in determining the base which is to be used in accounting. *Garretson* v. *Clark*, 111 U. S. 120, cited.

Same; importance of Lodge patent.—The ability to tune *selectively* and *adjustably* the antenna of any receiving station to any desired transmitting station, to which the Lodge patent relates, was of fundamental importance to radio communication.

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*Affirmed in part and reversed in part by the Supreme Court June 21, 1943. See page 815, *post*.

Syllabus

Same; market value of device.—While the Lodge invention dealt primarily with tuning, the invention was of such paramount importance that it substantially created the value of the component parts utilized in the radio transmitters and receivers purchased or acquired by the United States during the accounting period, and accordingly comes within the rule basing compensation for infringement upon the entire market value of the article of which the patented feature is a component part.

Same; royalty as measure of compensation.—The courts look with favor upon the establishment of a reasonable royalty as a measure of compensation in a patent accounting.

Same.—If the patentee has already established a royalty by a license or licenses, he has himself fixed the average of his compensation.

Same; monetary value.—Where no such license standard has been fixed, the courts will take into consideration any act or acts of the patentee in connection with third parties which would tend to indicate an accepted monetary value for use of the patentee's invention.

Same; testimony of experts.—Testimony of expert witnesses, more or less familiar with the establishment of royalty rates in any particular art, may be taken into consideration in determining compensation for infringement.

Same; repair; reconstruction.—With respect to the radio equipment in the instant case acquired prior to the period of accounting defendant undoubtedly has a right, under the patent law as interpreted by the courts, to repair a system but not to reconstruct a system; and the installation of a new receiver would amount to such reconstruction.

Same; spare parts.—The general theory relating to spare parts is in substance that the user of a patented machine or device, having once paid the patentee a royalty or other consideration for the right to the free use and enjoyment of such machine or device, is thereafter entitled to keep the machine or device in repair and to replace broken or worn-out unpatented parts of its mechanism with a corresponding part not necessarily purchased from the patentee.

Same.—The ultimate question is one of "repair" versus "reconstruction" and its practical determination to a large extent rests on the purpose for which the parts were intended.

Same; evidence in possession of defendant.—In an accounting for determination of compensation for infringement, while it is the duty of plaintiff to present *prima facie* evidence of the number of infringed devices and their monetary value, the evidence upon which plaintiff is forced to rely for this purpose is usually in the form of records and documents in the possession of the defendant, and this is especially true where the devices have been acquired by the infringer from third parties, as in the instant case.

Syllabus

Same.—Where confusion in the books or records of the defendant is found, or where profits from the infringing device have been commingled with other profits of the defendant, it is obviously impossible for the plaintiff to proceed beyond a certain point in its *prima facie* proof, and one party or the other must suffer. *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 621, cited.

Same; infringement is a question of fact and not of law under United States v. *Esnault-Pelterie, 299 U. S. 201.*—Under the decision of the Supreme Court in the case of *Esnault-Pelterie*, infringement is a question of fact rather than a question of law. (See *United States* v. *Esnault-Pelterie*, 299 U. S. 201, remanding the case to the Court of Claims for "specific findings whether plaintiff's patent in suit was valid, and, if found valid, whether it was infringed by the defendant"; and amended findings and new interlocutory judgment, 84 C. Cls. 625; affirmed 303 U. S. 26.)

Same; Marconi patent #763,772; claim 16; basis of compensation for infringement.—Upon the basis of the special findings of fact and the opinion of the Court of Claims in the instant case, filed November 4, 1935 (81 C. Cls. 671), in which it was held that the Marconi patent #763,772 was valid as to claim 16, and had been infringed by the United States; and upon the showing made in the hearing for an accounting, in accordance with said opinion; it is *held* that the plaintiff is entitled to recover 65 per cent of the total monetary value of the utility and advantages to the Government, as reasonable and entire compensation, together with interest at 5 per cent on said amount, not as interest but as a part of the just compensation; said interest to be calculated in accordance with the periods and amounts specified in the findings.

Same; Marconi patent; claim 16; effect and extent of prior decision of the court as to validity.—Where, upon a stipulation that the accounting be deferred until validity and infringement had been determined, the Court of Claims in its previous decision in the instant case (81 C. Cls. 671), in its conclusion of law, held that the Marconi patent #763,772 was invalid except as to claim 16 thereof, which was held to be infringed; and where the correctness or the sufficiency of the court's findings or conclusions was not questioned by the defendant, by a motion for new trial or otherwise; it is *held* that the question of infringement of Marconi claim 16 by the apparatus described in the findings of the prior decision is not before the court in the present accounting.

Same; question of infringement not reopened by court's order.—Where in an order, October 22, 1937, the court overruled defendant's motion for reconsideration of the court's allowance of plaintiff's motions for calls, and in said order stated the "claims which have been held valid and infringed are subject to proof before

the Commissioner"; it is *held* that by such order the question of infringement of claim 16 was not reopened.

Same; use and infringement by Government on legation grounds in foreign land.—Where 10 receivers held to infringe claim 16 of the Marconi patent were located and used at the United States Naval Radio Station at the United States Legation in Peking, China, within the legation grounds; it is *held* that use of a United States patent on the grounds of the said legation constitutes infringement thereof, and the said 10 sets are properly within the accounting, under the provisions of section 4884 of the Revised Statutes. *Gardiner* v. *Howe*, 9 Fed. Cases, 1157, cited. See also *Brown* v. *Duchesne*, 19 How. 183.

Same; comparison of costs.—Where if the defendant had not used the Marconi circuit it would have been possible to accomplish substantially the same basic results by the use of another type of tuning circuit, which was available to the defendant but at an increased cost; it is *held* that compensation for infringement may be arrived at by a comparison of such costs.

Same.—If the parties to the instant suit had been in negotiation for the use of the infringed invention it may be assumed that the price agreed upon would be less than it would have cost the defendant to use an equivalent device. *Olsson* v. *United States*, 87 C. Cls. 642, 659; *Wood et al.* v. *United States*, 36 C. Cls. 418, 426, cited.

The Reporter's statement of the case:

Mr. Abel E. Blackmar, Jr. for the plaintiff. *Mr. Richard A. Ford*, and *Sheffield & Betts* were on the briefs.

Mr. Clifton V. Edwards, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. J. F. Mothershead* and *Joseph Y. Houghton* were on the briefs.

The special findings of fact and opinion in this case, filed April 6, 1942, on the court's own motion were on April 15, 1942, amended; and the conclusion of law filed on April 6, 1942, was vacated and withdrawn, and a new conclusion of law, in accordance with the amended findings and opinion, was substituted therefor.

The special findings of fact and opinion, as so amended, appear below, the special findings of fact being as follows:

1. This is a patent suit filed to recover the reasonable and entire compensation for use by the United States of inven-

tions covered by United States letters patent to Marconi, Reissue No. 11,913; to Lodge, No. 609,154; to Marconi, No. 763,772, and to Fleming, No. 803,684.

The court in its special findings of fact and opinion of November 4, 1935 (81 C. Cls. 671), held and now finds as an ultimate fact that the Marconi reissue patent and the Fleming patent had not been infringed; that the Lodge patent was valid as to claims 1, 2, and 5, and had been infringed, and that the Marconi patent, No. 763,772, was invalid except as to claim 16 thereof, which claim was valid and had been infringed by the United States.

Reasonable and entire compensation is based on the infringement of the Lodge patent and Marconi patent No. 763,772.

LODGE PATENT NO. 609,154

2. Reasonable and entire compensation with respect to the Lodge patent is limited to apparatus purchased or acquired by the Government during the period extending from March 8, 1913, when plaintiff first gave notice of infringement to the defendant, to August 16, 1915, when the patent expired.

This period will hereinafter be referred to as "the Lodge accounting period."

3. During the Lodge accounting period the United States purchased and used both complete and incomplete wireless transmitters, receivers, and sets from various contractors, including the plaintiff and its licensees; during that period the United States also acquired such apparatus by manufacturing the same and by assembling it from parts which had been either purchased or manufactured or both. It also purchased or acquired spare parts for such apparatus and auxiliary apparatus, all of which was designed and intended for use as a part of and useful only as a part of such apparatus.

4. During the Lodge accounting period wireless transmitters acquired or purchased by the United States were either of the spark type or the arc type.

The essential elements of a complete spark transmitter comprise a source of electrical power such as a motor generator for providing an alternating current of a particular

frequency, usually 500 cycles, the purpose of this frequency being to provide an easily recognizable note or tone to the signals; a transmitter-transformer to step up the voltage; a primary circuit, including a spark-gap, an inductance coil (the primary of the oscillation-transformer), and ordinarily a condenser; a secondary circuit including an antenna, an inductance (the secondary of the oscillation-transformer), and a ground or earth connection; and a key or other suitable signalling means.

The essential elements of an arc transmitter were the same except that the source of electrical power provided a direct current of a proper voltage to operate the arc (usually 750 volts) so that no transmitter-transformer was required, the arc generator taking the place of the spark-gap.

The essential elements of a complete wireless receiver during the Lodge accounting period and as used by the United States comprised a primary circuit, including an antenna, a ground or equivalent connection, an inductance (the primary of the oscillation-transformer), and ordinarily a variable condenser; a secondary circuit, including an inductance (the secondary of the oscillation-transformer), and ordinarily a variable condenser; a suitable detector (either a crystal or a vacuum tube); in many instances a vacuum tube amplifier; and head telephones. A device known as a ticker was sometimes associated with the secondary circuit.

Except in the case of portable sets and wireless compass transmitters, the antenna was not purchased nor acquired as a part of the wireless apparatus but was always constructed and installed by the United States.

5. Claims 1, 2, and 5 of the Lodge patent, held valid and infringed by the court in its opinion of November 4, 1935, are as follows:

> 1. In a system of Hertzian-wave telegraphy, the combination, with a pair of capacity areas, of a self-inductance coil inserted between them electrically for the purpose of prolonging any electrical oscillations excited in the system and constituting such a system a radiator of definite frequency or pitch.

2. In a system of Hertzian-wave telegraphy, the combination, with a pair of capacity areas, of a self-inductance coil inserted between them electrically for the purpose of prolonging any electrical oscillations excited in the system, thus constituting the system a resonator or absorber of definite frequency or pitch, and a distant radiator of corresponding period capable of acting cumulatively.

5. In a system of Hertzian-wave telegraphy, the combination, with a pair of capacity areas, of a variably acting self-inductance coil, serving to syntonize such a radiator or resonator to any other such resonator or radiator, whereby signalling may be effected between any two or more correspondingly attuned stations without disturbing other differently attuned stations.

The substance of the Lodge invention, as expressed by the phraseology of these claims, is the tuning of the antenna circuits of radio transmitters and receivers to a definite frequency or wave length by means of a self-induction coil, and to the selective tuning or syntonizing of a given transmitting antenna to a given receiving antenna, to the exclusion of other stations operating on different frequencies or wave lengths.

The basic position of the Lodge patent in the art, and with respect to the original Marconi patent, is defined by the court in its findings of fact and opinion, 81 C. Cls. 671 (Finding XXXVI), in which it is stated that—

Marconi in his patent #586193 apparently did not appreciate the desirability of tuning the primary oscillating circuit by the use of an inductance coil, and did not contemplate varying the effective tuning of the receiver to one of several transmitters.

The American Therapeutic Association publication told how to determine and vary the period of an oscillating circuit by modifying the inductance and capacity.

The patents to Pupin #640516 dated January 2, 1900, filed May 28, 1895; Hutin et al., #838545 dated December 18, 1906, filed May 9, 1894; and Stone #577214, February 16, 1897, filed September 10, 1896, show that the laws of closed resonant circuits in general were known prior to the Lodge invention, but such patents do not show knowledge of the desirability of tuning an open oscillating circuit for Hertzian-wave signalling.

No one prior to Lodge appreciated the desirability of tuning the oscillating circuits of both the transmitter and receiver for the purpose intended and in the manner performed by him. [Italics supplied.]

The selective and adjustable tuning of the antenna circuits as taught by Lodge was of fundamental importance to practical radio or wireless communication during the Lodge accounting period, and there is no satisfactory evidence of any substitute for such invention during this period, the use of which would have resulted in wireless apparatus of any practical utility.

6. All the radio transmitters and receivers and sets purchased or acquired by the United States during the Lodge accounting period utilized the subject-matter of one or more of the Lodge claims referred to in the previous finding, and such utilization gave to the apparatus substantially its entire utility and market value.

7. The tabulation on the following pages, and which is a part of this finding, sets forth in itemized form the radio apparatus acquired by the United States during the Lodge accounting period without the license or consent of the plaintiff.

Certain contracts, abstracts, and other documents, plaintiff's Exhibits 51, 57, 63, 65, 66, 406, 407, 408, 408–A to 408–D, inclusive, 432, and 459, which are by reference made a part of this finding, comprise the sources of information for this table, and the numbers given in the first column of the table identify the various items set forth in the contracts and abstracts.

The procedure which was followed in the present case to prove what infringing apparatus was used or manufactured by or for the defendant was as follows: Plaintiff filed motions for calls on the Navy Department, War Department, and the General Accounting Office for various documents, including the complete files in the General Accounting Office with respect to certain specified contracts for the purchase of radio apparatus. In order to obviate the expense of photostatic copies, it was agreed that the requested documents would be made available to a representative of the plaintiff who would examine them and

make abstracts of their contents, which was done. These abstracts were submitted to a representative of the defendant for correction and the addition of any further desired material. The abstracts were then accepted in evidence in lieu of certified copies of the documents themselves. To facilitate the accounting proceeding, it was arranged that, in lieu of further formal motions for calls, plaintiff might make informal requests for the production of documents from defendant's files and that when such documents were located, the defendant would permit plaintiff's representative to examine them and make abstracts thereof in the manner above described.

8. In certain of the tabulated items liquidated damages totalling about 1% of the contract price given in the accompanying tabulation were assessed against the various contractors.

Such penalization of plaintiff's competitors has not been taken into account and the original contract price has been used in all instances to determine the market value.

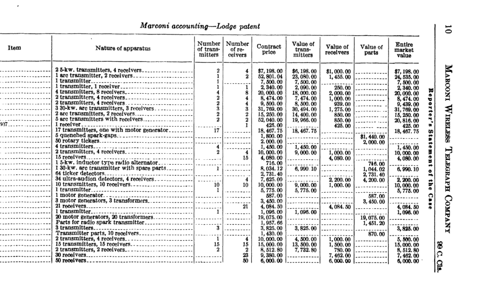
9. Certain of the items of the following tabulation are for parts of sets. A more detailed explanation of these items follows:

(*Item A–1*).—This item is for five quenched spark-gaps at a total contract price of $1,800. The contract file shows payment during the Lodge accounting period for four of the five gaps, the total amount of the payment being $1,440.

Quenched spark-gaps were designed and intended for use as generators of high-frequency current for radio transmission, and their sole utility is for this purpose.

(*Item A–3*).—This item covers a contract to the Federal Telegraph Company dated August 18, 1913. The contract called for fifty rotary tickers at a contract price of $2,000, which was paid in full during the Lodge accounting period.

A rotary ticker is a form of wireless detector primarily designed to detect continuous or undamped waves, although it will also receive damped waves. A rotary ticker is a part of a radio receiver and it has no use or utility other than in the reception of radio signals impressed upon the antenna of a receiving set.



Marconi accounting—Lodge patent

Item	Nature of apparatus	Number of transmitters	Number of receivers	Contract price	Value of transmitters	Value of receivers	Value of parts	Entire market value
31	2 5-kw. transmitters, 4 receivers	2	4	$7,198.00	$6,198.00	$1,000.00		$7,198.00
32*	1 arc transmitter, 2 receivers	1	2	52,801.04	23,080.00	1,455.00		24,535.00
33	1 transmitter	1		7,500.00	7,500.00			7,500.00
34	1 transmitter, 1 receiver	1	1	2,340.00	2,090.00	250.00		2,340.00
35	4 transmitters, 8 receivers	4	8	20,000.00	18,000.00	2,000.00		20,000.00
36	2 transmitters, 4 receivers	2	4	8,474.00	7,474.00	1,000.00		8,474.00
41*	2 transmitters, 4 receivers	2	4	9,500.00	8,500.00	939.00		9,439.00
48	3 30-kw. arc transmitters, 3 receivers	3	3	31,769.00	30,494.00	1,275.00		31,769.00
49	2 arc transmitters, 2 receivers	2	2	15,250.00	14,400.00	850.00		15,250.00
50*	5 arc transmitters with receivers	2	2	52,040.00	19,966.00	850.00		20,816.00
Pl. Ex. 407	1 receiver		1	425.00		425.00		425.00
52	17 transmitters, one with motor generator	17		18,467.75	18,467.75			18,467.75
A-1	5 quenched spark-gaps			1,800.00			$1,440.00	
A-3	50 rotary tickers			2,000.00			2,000.00	
A-4	4 transmitters	4		1,450.00	1,450.00			1,450.00
A-6	2 transmitters, 4 receivers	2	4	10,000.00	9,000.00	1,000.00		10,000.00
A-10	15 receivers		15	4,080.00		4,080.00		4,080.00
A-11	1 5-kw. inductor type radio alternator			716.00			716.00	
A-14	1 30-kw. arc transmitter with spare parts	1		8,034.12	6,990.10		1,044.02	6,990.10
A-15	64 ticker detectors			2,731.40			2,731.40	
A-16	34 ultra-audion detectors, 4 receivers		4	7,625.00		2,200.00	4,200.00	2,200.00
A-19	10 transmitters, 10 receivers	10	10	10,000.00	9,000.00	1,000.00		10,000.00
A-20	1 transmitter	1		5,775.00	5,775.00			5,775.00
A-21	1 motor generator			587.00			587.00	
A-22	3 motor generators, 3 transformers			3,450.00			3,450.00	
A-23	21 receivers		21	4,084.50		4,084.50		4,084.50
A-24	1 transmitter	1		1,096.00	1,096.00			1,096.00
A-25	20 motor generators, 20 transformers			19,075.00			19,075.00	
A-26	Parts for radio spark transmitter			1,957.66			1,451.20	
A-28	3 transmitters	3		3,825.00	3,825.00			3,825.00
A-29	Transmitter parts, 10 receivers			1,430.00			870.00	
A-32*	2 transmitters, 4 receivers	1	4	10,000.00	4,500.00	1,000.00		5,500.00
A-33	15 transmitters, 15 receivers	15	15	15,000.00	13,500.00	1,500.00		15,000.00
A-34	2 transmitters, 2 receivers	2	2	8,512.80	7,732.80	780.00		8,512.80
A-35*	30 receivers		23	9,380.00		7,462.00		7,462.00
A-36	50 receivers		50	6,000.00		6,000.00		6,000.00

A-37*	6 5-kw. transmitters with spare parts	6		24,900.00	24,000.00			24,000.00
A-38*	3 5-kw. transmitters	3		12,553.00	12,103.00			12,103.00
A-39*	5 5-kw. transmitters	5		19,625.00	14,718.75			14,718.75
A-53	4 receivers		4	1,560.00		1,560.00		1,560.00
A-54	14 receivers		14	4,550.00		4,550.00		4,550.00
A-55	15 receivers		15	1,938.75		1,938.75		1,938.75
A-56	8 2-kw. transmitters without power supply; 8 motor generators.	8		12,400.00	12,400.00			12,400.00
A-80	50 oscillation transformers			3,000.00			3,000.00	
B-15	1 10-kw. transmitter without motor generator	1		4,200.00	4,200.00			4,200.00
B-24	40 receivers		40	2,400.00		2,400.00		2,400.00
B-43	Parts for quenched spark-gap transmitter			1,132.80			1,129.20	
B-44	25 spark-gaps for transmitters			550.00			550.00	
C-1	50 audion detectors and amplifiers			12,250.00			12,005.00	
C-2	24 audion detectors			1,200.00			1,200.00	
Pl. Ex. 459	4 receivers		4	1,017.29		1,017.29		1,017.29
A-27	1 transmitter, 1 receiver	1	1	2,450.00	2,020.00	430.00		2,450.00
Tuckerton transmitter	1 transmitter	1		8,000.00	8,000.00			8,000.00
Eaton receivers	3 receivers		3	750.00		750.00		750.00
		102	260		296,480.40	51,796.54	56,448.82	348,276.94

*See Finding 10 for explanation of items marked with asterisk.

(*Item A–15*).—This item covers a contract with the Federal Telegraph Company dated March 27, 1914, and is for sixty-four ticker detectors, including spare parts, at a total contract price of $2,731.40. The contract file shows payment during the Lodge accounting period of the contract price with the exception of $13.90, which was withheld as liquidated damages.

The function and utility of ticker detectors have been discussed in connection with the prior item.

(*Item A–11*).—This item covers a contract with the Atlantic Communication Company dated September 22, 1913, for one 5-kw. inductor type radio alternator at a contract price of $716. The sum of $715.28 was paid during the Lodge accounting period, seventy-two cents having been withheld as liquidated damages.

An inductor type radio alternator is the source of high-frequency electrical energy for a radio transmitter, and during the Lodge accounting period such a device was useful only as a part of a radio transmitter.

(*Item A–16*).—This item calls for ultra-audion detectors which were radio detectors utilizing a form of oscillating audion. Such device is not useful in and of itself but only for use as a part of a radio receiver. The contract price of the thirty-four detectors was $4,200 and the contract price of the four receivers, $2,200. The $1,225 difference between the contract price of $7,625 and the $6,400 is for certain radio tubes or bulbs for which plaintiff does not claim compensation.

(*Item A–21*).—This item covers a contract with the Atlantic Communication Company dated June 10, 1913, and covers a motor generator, including a 5-kw. 500-cycle inductor type radio alternator. The contract price was $587, of which $579.37 was paid during the Lodge accounting period, the balance of $7.63 being withheld as liquidated damages. The motor generator is a device designed solely for the production of a 500-cycle alternating current as a source of energy in a radio transmitter, the 500 cycles being for the sole purpose and function of imparting to the transmitted radio signal a singing or musical tone charac-

teristic, easily recognizable by the receiving operator through static. The sole utility of these motor generators at the time of the Lodge accounting was for the generation and transmission of a radio signal from a transmitting antenna.

(*Item A-22*).—This item covers a contract with F. Lowenstein, dated May 13, 1913. The contract price was $2,700 for the motor generators and $750 for the transformers, or a total of $3,450.

The contract file shows payment during the Lodge accounting period of $3,340.40, the sum of $109.60 having been withheld as liquidated damages. The purpose and function of the motor generators have been detailed in the prior item, and the sole function and utility of the transformers was to step up the voltage of the 500-cycle current from the motor generators to a suitable voltage for operating the closed oscillation circuit of the transmitter, which produces the high-frequency oscillations which are fed into the antenna circuit.

(*Item A-25*).—This item covers a contract with the Atlantic Communication Company, dated June 2, 1913, and was directed to twenty radio motor generator sets of 5-kw. and 2-kw. sizes, together with the spare parts for same, and twenty transformers for use with the same, the total contract price being $19,075.

The contract file shows payment of $18,796.44, the sum of $278.56 having been withheld as liquidated damages.

The function and utility of the motor generators and transformers have been detailed in the two prior items.

(*Item A-26*).—This item covers a contract with the Atlantic Communication Company dated June 3, 1913, and called for various parts and elements relating to a transmitting set, at a total contract price of $1,957.66.

The following items depend for their entire utility in the generation of high-frequency current for transmission from a radio antenna:

1 primary variometer	371.20
1 5-kw. 500-cycle motor generator	950.00
1 5-kw. 500-cycle transformer	130.00
	1,451.20

(*Item A–29*).—This item covers a contract with the National Electrical Supply Company dated January 23, 1914, for various radio transmitter parts, such as transformers, high-tension condensers, spark-gaps, oscillation transformers, and receiving sets, at a total price of $1,430. These parts have no other utility than the generation of high-frequency current for use in a radio transmitting antenna.

The contract file shows that the sum of $870 was paid during the Lodge accounting period covering the transformers, spark-gaps, and parts. There is no evidence as to the delivery of or payment for the condensers or receiving sets. The abstract of this contract states as follows:

> No record of completion of delivery of order as shown by contract files.

(*Item A–30*).—This item covers a contract with the National Electrical Supply Company dated September 17, 1914, and was for fifty oscillation transformers at a total cost of $3,000. Such transformers were used as a part of the radio frequency circuits of wireless transmitters, and either both coils of the transformer were used in the antenna circuit as a loading coil or the secondary coil of the transformer was used in the antenna circuit, in either instance to tune that circuit.

The contract file shows payment of the full contract price to the contractor during the Lodge accounting period.

(*Item B–43*).—This item refers to a contract with the National Electrical Supply Company dated November 14, 1914, and which called for an incomplete set of parts for a quenched-gap wireless transmitter, the aggregate contract price being $1,132.80. The parts have utility only in furnishing high-frequency current to a radio transmitting antenna.

The payment made to the contractor, however, during the Lodge accounting period was $1,129.20, due to the fact that certain small parts were furnished by the defendant. There is no proof as to when this group of small parts was acquired by the defendant.

(*Item B–44*).—This item covers a contract with William A. Knapp dated December 2, 1914, and is for twenty-

five spark gaps at a total price of $550. A spark gap is an apparatus the sole utility of which, during the Lodge accounting period, was to enable the transmitter condensers to become charged and then to subsequently discharge into the local oscillating circuit with a consequent generation of high-frequency current which was transferred to the antenna circuit.

The entire amount of the contract was paid to the contractor during the Lodge accounting period.

(*Item C–1*).—This item covers a contract with the DeForest Radio Telephone and Telegraph Company dated April 30, 1915. It included among other things fifty combined audion detectors and one-step amplifiers at a total price of $12,250. These detector amplifiers had their sole utility in the detection and amplification of the relatively weak energy received on a receiving antenna.

The contract file shows payment to the contractor during the Lodge accounting period of the sum of $12,005, covering the cost of forty-nine of the detector amplifiers.

(*Item C–2*).—This item covers a contract with the DeForest Radio Telephone and Telegraph Company dated June 30, 1915, and included among other things twenty-four audion detectors at a total price of $1,200. The utility of these detectors as to circuits and function was the same as the detector portions of the detector amplifiers of the previous item (C–1).

The contract file shows payment in full for the twenty-four audion detectors during the Lodge accounting period.

10. In certain other items of the tabulation indicated by a single asterisk the entire market value is less than the contract price. A detailed explanation of these items is as follows:

(*Item 32*).—This item covers a contract for high-power radio installation for the Naval Station at Caimito, Panama Canal Zone. The total contract price was $52,801.04 and included such general items as powerhouse machinery, powerhouse switchboard, wiring from powerhouse to operating house, and powerhouse wiring. The price of the "wireless apparatus" was $24,535, which amount was paid

in full during the Lodge accounting period. The elements comprising the "wireless apparatus" and the prices of each are as follows:

TRANSMITTER

Helix	$3,000.00
Poulsen arc	11,210.00
Wave change switch and antenna	2,000.00
2 relay keys	4,500.00
2 sets choke coils	500.00
Switchboard	1,470.00
Antenna entrance	400.00
Total cost of transmitter	23,080.00

RECEIVERS

1 receiving cabinet, 600–3,000 m	450.00
1 receiving cabinet, 2,000–10,000 m	450.00
4 head receivers	20.00
2 110 v. tickers	100.00
1 6 v. ticker	50.00
1 triple audion amplifier	385.00
Total cost of receivers	1,455.00

(*Item 41*).—This item is for two radio sets at a contract price of $9,500. Payment of $9,439 was made during the Lodge accounting period, a balance of $61 being withheld because the defendant itself supplied four telephone head sets for the receivers, and the amount payable to the contractor was therefore reduced by this amount. There is no evidence to show whether the telephone head sets were acquired by the Government within the Lodge accounting period.

(*Item 50*).—This item calls for five 30-kw. arc radio sets complete with receivers at a total contract price of $52,040. The contract is in evidence as plaintiff's Exhibit 406, and shows that two of the five sets were delivered during the Lodge accounting period. Attached to the contract file were three receipts which referred to three vouchers by number and stated that they were missing. On the first page of the contract and with reference to these same three vouchers, the following memorandum appeared:

Contract 350 P. 3 Abstracted 3-14-38 GHC
On first page of contract is the following memorandum in red ink:

878	4/15 NY	19,016.00	
1731	4/15 NY	1,200.00	
2262	1/16 NY	600.00	20,816.00

There is no proof of delivery of or payment for the remaining three sets during the accounting period, which expired August 16, 1915.

(*Item A-32*).—This item covers a contract, plaintiff's Exhibit 57, which called for two 5-kw. wireless sets each with two receivers, the contract price being $10,000. The contract file shows delivery and satisfactory operating condition of one of the transmitters, together with partial payment of the same, by December 29, 1912, and therefore prior to the Lodge accounting period. Payment for the second set (contract price $5,000) and the four receivers was made during the Lodge accounting period. The receivers delivered under this contract were of the IP-76 type and were of an average price of $250 each.

(*Item A-35*).—This item covers a contract calling for thirty radio receivers at a total contract price of $9,380. The contract file shows delivery of and payment during the Lodge accounting period for twenty-three of the receivers. There is no proof of delivery of or payment for the remaining seven receivers, the contract price for which was $1,918.

(*Item A-37*).—This item covers a contract calling for six 5-kw. wireless transmitters with spare parts. The total contract price was $24,900. The contract file shows payment to the contractor during the Lodge accounting period of $24,000, which is the full contract price less $900 "for material supplied by the Navy Department." There is no satisfactory evidence as to when this material was acquired by the defendant or whether such material is already included and formed a part of the material listed in the tabulation on pages 6 and 7.

(*Item A-38*).—This item called for three 5-kw. wireless transmitters at a contract price of $12,553. The contract file shows $450 taken from the full contract price for

apparatus (short-circuiting switches) supplied by the defendant. There is no proof as to when such apparatus was manufactured or acquired by the defendant.

(*Item A-39*).—This item covers a contract with F. Lowenstein dated August 4, 1914, which called for five 5-kw. wireless sets exclusive of receivers and wave meters, at a contract price of $19,625.

The contract file shows delivery of the five sets and payment to the contractor during the Lodge accounting period of 75% of the contract price, viz, $14,718.75. There is no record of payment of the remaining 25% and no record of this being withheld as liquidated damages.

11. The item on the tabulated list appearing on pages 6 and 7, designated "Plaintiff's Exhibit 459," refers to four receivers, and lists under the contract price and the entire market value the amount of $1,017.29. These four receivers were manufactured at the Washington Navy Yard and completed July 13, 1915 (within the Lodge accounting period), at a total actual cost of $1,017.29.

Plaintiff's Exhibit 459 is the Navy Yard summary of the estimated and actual costs of these sets.

(*Item A-27*).—This item refers to one transmitter and one receiver covered by a contract with the Telefunken Company dated January 29, 1913, for installation on the U. S. Army transport *Liscum*, the contract price being $2,450. While the abstract of this contract shows no record of payment in the contract file, plaintiff's Exhibit 428, Item 9, has reference to an official notice referring to this contract and indicating that this set was inspected and accepted.

(*Tuckerton arc transmitter*).—In 1914 the Navy Department installed a 60-kw. arc transmitter at Tuckerton, New Jersey, which transmitter was subsequently removed to the Naval Radio Station at Arlington, Virginia. The estimated market value of this transmitter is $8,000.

(*Eaton receivers*).—Three radio receivers were constructed or assembled from parts during the years 1913–1915; the first was assembled and used at Arlington, the second at the Naval Laboratory, and the third at Tuckerton.

These receivers were assembled from parts already on hand at the localities specified.

The approximate market value of these receivers was $750.

12. Certain apparatus, designated as follows, has been omitted from the itemized list of apparatus appearing on pages 6 and 7 as not properly coming within the accounting:

(*Item A–5.*)—This item calls for one arc transmitter and one receiver for a contract price of $5,500. The contract was with the Federal Telegraph Company under date of November 2, 1914.

The contract file contains no record either of delivery of the apparatus or payment therefor.

(*Item B–20.*)—This item covers a War Department order dated October 10, 1913, to the National Electrical Supply Company for fifteen helices, fifteen spark-gaps, and fourteen receiving sets, the total of the contract price being $982. With the exception of the fifteen helices, there is no satisfactory evidence either of delivery of or payment for these items within the accounting period.

(*Item B–21.*)—This item covers a War Department order to the National Electrical Supply Company dated October 22, 1913, for thirteen helices, fifteen spark-gaps, and five receiving sets at a contract price of $445. There is no satisfactory evidence either of delivery of or payment for these items within the accounting period.

(*Item B–52.*)—This item covers War Department order 13967 to the National Electrical Supply Company dated October 27, 1913. The order covers four spark-gaps, three helices, and nine receiving sets at a total contract price of $449. There is no satisfactory evidence either of delivery of or payment for these items within the accounting period.

13. During the Lodge accounting period the plaintiff granted certain nonexclusive licenses to others to manufacture and sell wireless apparatus embodying the invention of the Lodge patent. These licenses (plaintiff's Exhibits 360 and 447, which are by reference made a part of this finding) were under and included both the Lodge patent and the Marconi patent No. 763,772, and are herewith summarized as follows:

(a) Under date of July 14, 1914, to National Electrical Supply Company. The license was under the Lodge patent and Marconi patent and granted a nonexclusive license to

manufacture ¼-kilowatt portable wireless telegraph sets and sell them to the United States; the royalty provided for therein was $250 a set. The license was terminable by the plaintiff on 30 days' notice, and was canceled under date of January 24, 1916.

(b) Under date of April 15, 1915, to the National Electrical Supply Company. The license was under the same two patents and granted a nonexclusive license to manufacture wireless telegraph apparatus and sell it to the United States. It was stated to amend, modify, and supplement the above-mentioned agreement of July 14, 1914. The royalties provided for therein were 20 percent of the gross selling price on all sets having a capacity up to and including one kilowatt; 25 percent thereof on all sets between one and three kilowatt capacity, and 33⅓ percent thereof on all sets above three kilowatt capacity.

Article 12 of this license agreement defines in the following phraseology the base to which the license fee is applied:

> Twelfth. In order to prevent any dispute between the parties hereto as to the license fee due and payable hereunder, it is agreed that the term "apparatus" or "set" as used in this agreement, shall cover and include only the following elements:
>
> 1. Primary Generator of Mechanical Power or a Primary Generator of direct or alternating electric current.
> 2. Switchboard (or) starting Device.
> 3. Transformer.
> 4. Spark gap and cooling device.
> 5. Oscillation producer (arc, Spark or other).
> 6. Transmitting condenser.
> 7. Transmitting oscillation transformer.
> 8. Antenna inductance.
> 9. Operating key and (or) equivalent relay.
> 10. Antenna switch.
> 11. Receiving oscillation transformer.
> 12. Receiving condenser.
> 13. Detector.
> 14. Receiving oscillation producer.

Article 12 of this license also states that if the licensee should sell any of the elements listed less than the whole number, then the licensee should pay to the licensor the rate of license fee previously provided. This license was terminable

by either party on 30 days' notice and was canceled under date of January 24, 1916.

(c) Under date of October 15, 1914, to National Electric Signaling Company. The license was a cross-licensing agreement by which the plaintiff granted to the Signaling Company a nonexclusive license to make, use, lease, and sell wireless telegraph and wireless telephone apparatus embodying the inventions of the Lodge patent, the Marconi patent No. 763,772, and a Freeman patent, No. 773,069. Where apparatus was sold the royalty was 20 percent of the gross selling price, including sales to the United States, except that the royalty was 30 percent on sales for use on foreign ships.

The base upon which the royalty was payable was defined as the same elements listed in Article 12 in the license agreement of April 15, 1915, with the National Electric Signaling Company, with the exception that item or element No. 1 is specified as "motor generator." This license agreement also specified that if either party should sell any of the elements listed less than the whole number the licensee should pay to the licensor 20 percent of the selling price of the elements sold.

The license was terminable by the plaintiff during a certain period, on 90 days' notice, and notice of cancellation thereof was given by plaintiff on March 1, 1917, such cancellation taking effect on May 30, 1917.

This agreement was entered into to settle litigation which was pending between the parties, including a suit by plaintiff against the National Electric Signaling Company on the Lodge and Marconi patents (*supra*) wherein both of these patents had been held by the United States District Court for the Eastern District of New York valid and infringed as to certain claims thereof. The agreement contained a release from all claims for damages and profits for past infringement.

The above-mentioned Freeman patent was never adjudicated. The apparatus disclosed in that patent has never gone into use and the disclosure thereof was not embodied in any apparatus purchased, acquired, or used by the United States.

(d) Under date of July 26, 1915, to Clapp-Eastham Company. The license was under the Lodge and Marconi patents (*supra*) and granted a nonexclusive license to manufacture wireless telegraph apparatus and sell it to the United States and to amateurs; the royalty provided for therein was 20 percent of the listed catalogue or gross selling price of each set.

The base upon which the royalty was to be determined was defined to include the same listed elements as are contained in Article 12 of the license agreement of April 15, 1915, with the National Electrical Supply Company. This agreement also carried the clause that if the licensee should sell any of the listed elements less than the whole number, the royalties should be those which were provided, viz, 20 percent on all sets sold to the Government of the United States.

This license was subsequently canceled, but there is no evidence as to its date of cancellation.

14. Following the expiration of the Lodge patent on August 16, 1915, the plaintiff granted numerous nonexclusive licenses under the Marconi patent alone. These licenses, copies of which are contained in plaintiff's Exhibit 447, included licenses granted to William J. Murdock & Company, Sears, Roebuck and Co., A. W. Bowman & Company, and a new license to the Clapp-Eastham Company (for prior license to Clapp-Eastham Company covering both Lodge and Marconi patents at 20 percent royalty, see Finding 13 (d)).

The license fee or royalty provided for in these subsequent license agreements was 10 percent of the lowest selling price on all sets sold to amateurs.

15. A fair and reasonable royalty for the use of the invention or inventions, as defined in claims 1, 2, and 5 of the Lodge patent and during the accounting period, is 10 percent of the selling price or market value of the radio transmitters and receivers, including such apparatus as is dependent upon the inventions thus defined for its utility.

16. A reasonable and entire compensation for the use of the Lodge invention is 10 percent of the entire market value of the apparatus tabulated on pages 6 and 7, or $34,827.70,

plus an amount measured by interest at 5 percent per annum, not as interest but as part of the entire or just compensation, on $34,827.70 from August 16, 1915, to date of payment of the judgment.

MARCONI PATENT NO. 763,772

17. The original petition in this case having been filed on July 29, 1916, and supplemental amended petitions having been filed on May 21, 1919, and June 15, 1922, the accounting period with respect to the Marconi patent, claim 16 of which was held valid and infringed, extends from July 29, 1910, to November 20, 1919, at which time plaintiff assigned the patent. Claim 16 relates to radio receiving circuits.

18. Radio receiving circuits during the period of the accounting and as disclosed and claimed in the Marconi patent comprised two circuits—the open circuit and the closed circuit.

The open circuit consisted of the elevated wire or antenna and a ground connection, together with certain associated tuning instrumentalities. The closed circuit comprised certain tuning instrumentalities and was connected to a detector apparatus to enable the received signals to be rendered audible to the operator.

The open and closed circuits were associated or coupled to each other so that a transfer of energy could take place from the open circuit to the closed circuit. This coupling means in general comprised a coupling transformer, the primary winding of which was associated with the open circuit and the secondary of which was associated with the closed circuit.

19. All radio circuits, whether of open circuit or closed circuit type, inherently possess two electrical characteristics, i. e., inductance and capacity, and the natural frequency or periodicity of a circuit is dependent upon the square root of their product. Besides the inherent capacity and inductance of a circuit, the circuits also generally contained additional capacity and inductance, either of fixed or adjustable value.

An adjustable capacity during the accounting period usually consisted of a condenser having a series of fixed plates

interleaved with a series of movable or adjustable plates so that the capacity value could be altered by the extent of the contiguous area of the plates. An adjustable inductance usually consisted of a circular coil on a form, either having taps brought out to a switch or having a movable contact adjacent the turns of the coil whereby more or less turns could be included in the circuit.

By the adjustment of either or both of these two instrumentalities the periodicity of the circuit with which they were associated could be altered or tuned. As the variation of the capacity of the condenser is continuous throughout its range, whereas the variation of inductance is by steps only (either by single turns or by multiples thereof), it follows that finer or more accurate tuning may be obtained by the use of a variable condenser.

In the utilization of such circuits for receiving purposes, during the accounting period the operator usually relied upon adjustment of the inductance for coarse or preliminary tuning and the condenser for subsequent fine adjustment.

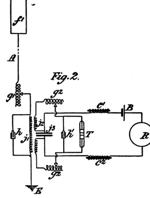
20. Claim 16 of the Marconi patent, held valid and infringed by the court in its opinion of November 4, 1935, is as follows:

> At a receiving station employed in a wireless-telegraph system, the combination of an oscillation transformer, an open circuit connected with one coil of said transformer, said circuit including an oscillation-receiving conductor at one end and capacity at the other end, *an adjustable condenser in a shunt connected with the open circuit and around said transformer-coil*, a wave-responsive device electrically connected with the other coil of the oscillation transformer, and means for adjusting the two transformer-circuits in electrical resonance with each other, substantially as described. [Italics supplied.]

As shown in Fig. 2 of the Marconi patent, herewith reproduced, the claim refers to a receiving apparatus in which the principal elements are an open or antenna circuit adapted to receive the radiated energy from a transmitting station, and a closed circuit coupled to the open circuit by means of an oscillation transformer, the closed circuit being

adapted to deliver energy to a wave-responsive device or a detector. The patent discloses means for adjusting or tuning the periodicity of both circuits with respect to each other and to the periodicity of the radio impulses received on the antenna, so that for any selected wave length or frequency of the received energy the effect on the wave-responsive device will be a maximum.

These means as disclosed in Fig. 2 of the patent comprise, for the antenna circuit, an adjustable inductance g^1



and an adjustable capacity or condenser h in shunt with the primary winding j^1 of the oscillation transformer; and for the closed circuit the adjustable inductances g^2 g^2.

21. The Marconi patent describes the preferred construction of the condenser h as—

> one provided with two telescoping metallic tubes separated by a dielectric and arranged to readily vary the capacity by being slid upon each other.

The mode of operation and function of such a construction is to provide variation in the periodicity of the open

or primary circuit with which the adjustable condenser is associated. In this connection the patent states—

> The capacity and self-induction of the four circuits—i. e., the primary and secondary circuits at the transmitting-station and the primary and secondary circuits at any one of the receiving-stations in a communicating system—are each and all to be so independently adjusted as to make the product of the self-induction multiplied by the capacity the same in each case or multiples of each other—that is to say, the electrical time periods of the four circuits are to be the same or octaves of each other.

The degree of variation effected in the periodicity of the open circuit by the adjustable condenser is dependent upon the constants of the associated circuit (inductance and capacity) and upon the maximum-minimum values of the condenser capacity.

The size and spacing of the cylinders, and therefore the maximum and minimum values of the capacity, are not specified, but left to the design of those skilled in the art.

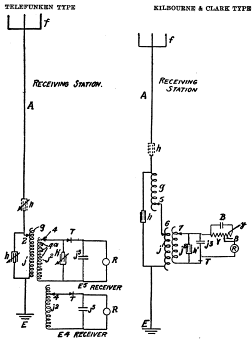
22. While the patent specifically states that the adjustment of the self-inductances and capacity of any or all of the four circuits can be made in any convenient manner and by employing various arrangements of apparatus, it also indicates by way of example certain preferred values of inductance and capacity, and transformer construction (size of wire and number of turns, etc.) for six specified tunes or wave lengths.

These values are given in tabular form and include the number of turns in the inductances and the capacity in microfarads of the condensers. These data, so far as the transmitting-station is concerned, give the length of the aerial conductor or antenna, and therefore indirectly give its inductance and capacity. The data with respect to the receiving antenna are not given.

While six specified tunes or wave-lengths are given by way of example, the Marconi invention, as disclosed in the specification and as defined in claim 16, is not limited to any specified wave-lengths or frequencies.

23. The court in its opinion of November 4, 1935, held and now finds that the receiving apparatus of the Kilbourne

& Clark Company and that made by the Telefunken Company infringed claim 16 of the Marconi patent. The circuits of these two receivers are reproduced herewith, and



in each of the circuits the condenser h is in a shunt connection with the open circuit and around the primary of the transformer coil, in the Kilbourne & Clark circuit the tuning condenser being in parallel with the load coil

and primary. The condenser h is also shown in dotted position in series with the antenna lead. This dotted position, however, is merely indicative of an alternative arrangement of these circuits in which the condenser h may be used in series connection instead of shunt connection.

24. During the Marconi accounting period the United States purchased, acquired, or manufactured and used wireless receivers and receiving tuners having circuits in which an adjustable condenser was utilized or adapted for shunt connection with the open circuit and around the primary of the transformer coil. The adjustable condenser in such a circuit had the function and effect similar to that possessed by the adjustable condenser of the Marconi patent and in the Telefunken and Kilbourne & Clark sets found by the court to infringe and referred to in the previous finding, and was for the purpose of varying the periodicity of the primary circuit with which it was associated.

These sets are listed in the itemized schedule forming a part of Finding 32.

25. The contract cost of the sets thus acquired by the Government in many instances relates to the complete receiver and includes detector devices and electrical apparatus more particularly directed to an effect on a signal subsequent to its passage through the tuner portion of the receiving set, and such devices do not properly come within the accounting.

Due to the difficulty of segregating the costs of the tuner portion of a receiving set from the remainder of the associated apparatus it is impossible to use the cost of the sets as a basis in establishing a fair and reasonable compensation.

26. If the defendant had not utilized or made provision for the utilization of the shunt condenser connection as exemplified in the Telefunken and Kilbourne & Clark sets and covered by claim 16 of the Marconi patent, it would have been possible to accomplish substantially the same basic results by the use of another type of tuning circuit, but at an increased cost. Compensation may therefore be arrived at by ascertaining the monetary value by a comparison of these circuits.

27. The above-mentioned comparison involves the shunt

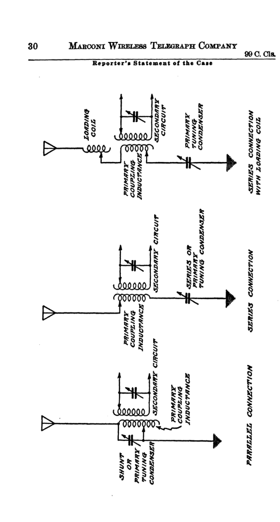
circuit condenser connection hereinafter referred to as the "parallel connection" (the terms "shunt" and "parallel" being synonymous in electrical parlance), and a circuit herein termed the "series connection." Three figures are reproduced herewith for the purpose of presenting certain effects in these comparative circuits.

The middle diagram thereof is illustrative of the series connection and shows an antenna circuit connected to one end of the primary of the coupling transformer, the opposite end of the coupling transformer being connected to the ground through a tuning condenser connected in series with the transformer winding. In this center diagram, as in the other two diagrams, the secondary circuit is shown as including only the secondary winding of the transformer and the secondary tuning condenser, the remaining elements of this circuit, such as the detecting devices and associated circuits, being omitted from these diagrams for simplification.

With the arrangement in the primary circuit as shown in the middle diagram and regardless of the maximum value of the condenser, no longer wave length can be received than could be received by omitting the condenser and connecting the primary transformer winding directly to ground, a condenser of relatively large capacity having the same effect on this circuit as an uninterrupted conductor from the lower end of the primary winding to the ground.

In other words, an adjustable condenser connected in series, as exemplified in the diagram, can be used to shorten the natural resonant wave length of the antenna circuit, but cannot lengthen it beyond what would be the resonant wave length if the condenser were not present. The maximum wave length which can therefore be received by a primary circuit with the series condenser connection is dependent upon the constants (inductance and capacity) of the antenna circuit.

If it is desired to receive a longer wave length with the series condenser it then becomes necessary to increase the constants or resonant wave length of the antenna circuit by inserting in the same an additional inductance in the form of what is known in the art as "a loading coil." By addition


SHUNT OR PRIMARY TUNING CONDENSER
SECONDARY CIRCUIT
PRIMARY COUPLING INDUCTANCE
PARALLEL CONNECTION
PRIMARY COUPLING INDUCTANCE
SECONDARY CIRCUIT
SERIES OR PRIMARY TUNING CONDENSER
SERIES CONNECTION
LOADING COIL
PRIMARY COUPLING INDUCTANCE
SECONDARY CIRCUIT
PRIMARY TUNING CONDENSER
SERIES CONNECTION WITH LOADING COIL

of this inductance the natural periodicity of the antenna circuit is slowed down or decreased, thereby enabling the antenna circuit to become resonant to longer wave lengths.

It was the practice during the accounting period to use this method in the series circuit, the loading coil comprising in actual practice a circular hard rubber or bakelite form provided with plugs or binding posts so that the same could be readily plugged in or connected to a receiving set between the antenna connection of the set and the upper terminal of the primary winding of the coupling transformer.

Such an arrangement is shown in the right-hand figure.

28. In lieu of the loading coil method of increasing the resonant wave length to which the antenna circuit will respond, the same basic result may be accomplished by placing the adjustable tuning condenser in a shunt circuit around the primary of the coupling transformer. Such a parallel connection of the condenser as shown in the left-hand figure functions to decrease the natural periodicity of the antenna circuit below what it would be in the absence of the condenser, and thereby enables the primary circuit to be tuned to the relatively longer wave lengths.

29. For any given receiving installation in which the electrical constants of the antenna and the receiving set are known, the basic advantage of receivers constructed to utilize the shunt condenser connection may be ascertained in money value by calculating the size and cost of the loading coil required in the alternative series circuit to receive a signal of the same wave length. Such a calculation involves primarily the number of turns of wire necessary to provide the additional inductance. From this figure the length and cost of the wire are ascertainable, to which may be added the cost of the hard rubber coil form, together with the necessary labor cost and a profit. The total cost of the loading coil will therefore represent the monetary advantage due to the use of the shunt condenser connection.

30. Besides the monetary advantage in the receivers constructed to utilize the shunt condenser connection, as indicated in the previous finding, this type of connection as

compared with the series connection, plus the loading coil, results in other advantages, as follows:

(a) The set is more compact, requires less room, and weighs less;

(b) At the longer wave lengths the sensitivity and selectivity are both greater.

This latter advantage is due to the fact that the use of a loading coil introduces additional resistance into the antenna circuit, and also an effect known as distributed capacity in which the adjacent turns on the loading coil tend to act as small capacities. The resistance tends to weaken the already feeble currents induced in the receiving antenna, and the distributed capacity effect tends to dissipate them.

These advantages, while somewhat intangible, are nevertheless of real benefit.

31. During the Marconi accounting period, especially in 1917–1919, the reception of messages, press and weather reports, enemy propaganda, etc., on the longer wave lengths was of great importance to the United States, particularly in the Naval service. As early as 1913, time signals and weather reports were regularly transmitted on the wave length of 2,500 meters. By 1915, much longer wave lengths were in use, wave lengths up to 15,200 meters having been regularly assigned. From this time on, the entire Primary System of Naval communications was carried on on wave lengths above 3,000 meters, and the regular communication wave length for the Secondary System was 952 meters. In 1919 and prior thereto practically all long-distance radio communication, such as transoceanic, transcontinental, etc., was carried on on wave lengths above about 10,000 meters. Plaintiff's Exhibit 484, which is by reference made a part of this finding, shows fifty-seven (57) orders issued by the Navy Department in 1916 for loading coils, each for a different station, such loading coils being for the purpose of increasing the wave-length range of existing sets.

32. For convenience of consideration, the receiving sets acquired and used by the Government during the Marconi accounting period and so constructed as to utilize the invention set forth in claim 16 of the Marconi patent, are

segregated into groups, as shown in the accompanying tabulation. The following tabulation carries in the last column the size of a loading coil (expressed in millihenries of inductance) which would be necessary for use as an alternative to the parallel condenser connection.

RECEIVERS WITH PERMANENTLY CONNECTED PARALLEL CONDENSER

Item No.	Contract No.	Approximate year acquired	Number of receivers	Type of receivers	Additional coil size
Pickard		1918	4	Otter Cliffs	74.3
W. Spec. App. Co.		1918	5	do	74.3

RECEIVERS WITHIN GROUP I

15–16	35659	1919	266	SE–950	4.73
J. O.	12–Z–2252	1919	25	SE–950	4.73
17	36124	1919	288	SE–1012	1.13
J. O.	12–Z–2309	1919	25	SE–1012	1.13
21–22	40459	1919	246	SE–1012A	1.13

RECEIVERS WITHIN GROUP II

(a) TELEFUNKEN RECEIVERS

A–51		1910	2	(Telef.)	5.85
38	211	1911	2	GAH, KOHF	3.33
40	13549	1911	1	GAH	.5
A–60	444	1911	3	GAH or KOHF	3.33
B–31	455	1911	4	GEK–2	5.85
B–31	455	1911	3	(Telef.)	3.33
28	458	1912	2	GAH	.37
29	144	1912	3	GEK–2	4.2
39	12899	1912	38	GAH, KOHF	6.06
42	15232	1912	8	GAH, GEK–2	7.75
42	15232	1912	4	do	.3
43	15294	1912	6	GAH	3.33
44	101	1912	2	GEK–2	2.34
45	16408	1912	1	do	1.0
45	16408	1912	1	do	.3
45	16408	1912	1	do	2.34
46	14747	1912	15	E–5	3.33
47	256	1912	1	(Telef.)	4.2
A–76	538	1912	2	E–4	3.33
A–77	486	1912	1	(Telef.)	3.33
B–32	468	1912	1	GAH or KOHF	3.33
B–33	474	1912	1	do	3.33
30	123	1913	6	E–4, E–5	2.34
A–78	510	1913	4	(Telef.)	3.33
A–79	527	1913	1	do	3.33
34	608SC	1914	1	E–4	7.5

(b) FEDERAL RECEIVERS

(Arlington)		1912	1	Federal	3.4
Plf. Ex. 407		1913	1	do	6.5
32	1948B	1914	1	do	10.3
48	269	1914	3	do	3.9
49	55	1915	2	do	6.5
50	350	1915	2	do	6.5

RECEIVERS WITHIN GROUP II—Continued

(c) MISCELLANEOUS

Item No.	Contract No.	Approximate year acquired	Number of receivers	Type of receivers	Additional coil size
A-27	562	1913	1	IP-76 (1913)	7
35	231	1914	4	Spec. 16-R-1	18.6
A-35	19882	1914	10	IP-76 (1914)	10.5
A-35	19882	1914	13	IP-76 (1912)	4
36	225	1915	5	Spec. 16-R-1	18.6
41	20437	1915	4	do	18.6
A-7	157	1917	3	do	18.6
A-12	186	1917	1	do	18.6
Ericson		1917	1		2.27
Montcalm		1919	10		85.4
Nat. Elec. Sup. Co.		1919	2	Remodeled	.615

RECEIVERS WITHIN GROUP IIIA

Item No.	Contract No.	Approximate year acquired	Number of receivers	Type of receivers	Additional coil size
J. O	12-Z-23629	1917	1	SE-143	16
6	31414	1918	247	do	16
10	33077	1918	150	do	16
12	1064	1918	30	SE-952	2
14	35479	1918	306	SE-143	16
18	3385	1918	27	SE-899	10
19	35979	1918	50	SE-998	.7
5	31413	1919	112	SE-143	16
8 (part)	375	1919	27	SE-899	10
9	33064	1919	200	SE-143	16
13	35478	1919	200	SE-899	10
26	43723	1919	301	do	10
J. O	12-Z-24328	1919	183	SE-143	16

RECEIVERS WITHIN GROUP IIIB

Item No.	Contract No.	Approximate year acquired	Number of receivers	Type of receivers	Additional coil size
7	853	1917	100	CN-239	36
A-47	28838	1917	1	CN-208	6.25
A-47	28838	1917	1	CN-239	36
3 (part)	28735	1918	27	CN-208	6.25
3 (part)	28735	1918	40	CN-239	36
4	95	1918	200	CN-240	36
11	939	1918	1	CN-208	6.25
J. O	12-Z-1857	1918	60	SE-95	130
8 (part)	375	1919	73	CN-240	36
20	38271	1919	300	SE-1220	30
24	42615	1919	59	do	30
Pl. Exh. 432		1919	201	do	30
Pl. Exh. 432		1919	13	SE-95A	130
A-48	34429	1919	60	SE-1220	30

NOTE.—The item numbers given in the first column of the table identify the various items set forth in the contracts and abstracts listed in Finding 7 and made a part thereof.

Where J. O. occurs under an item number, this indicates manufacture by the Government under a job order instead of purchase by contract.

33. A more detailed explanation of certain of the items included in the above tabulation is as follows:

(*Arlington Federal receiver*).—In the latter part of 1912 a Federal Telegraph Company radio receiver was acquired by the Navy Department for use at the Arlington Navy Radio Station, this receiver being used in official Navy work,

and the set had a switch providing for the parallel connection of the antenna tuning condenser.

(*Item A-27*).—This item refers to one receiver covered by a contract with the Telefunken Company dated January 29, 1913, for installation on the U. S. Army Transport "*Liscum.*" While the abstract of this contract shows no record of payment in the contract file, plaintiff's Exhibit 428, item 9 has reference to an official notice referring to this contract and indicating that the set of which this receiver was a portion was inspected and accepted.

(*Item A-47*).—This item refers to a contract for one long-wave receiver and one short-wave receiver. By cross-reference to the contract abstracted under Item 3, these sets specified are one type CN-208 short-wave receiver and one type CN-239 long-wave receiver. These receivers were paid for by a check dated June 28, 1917.

(*Item A-48.*)—This item relates to contract No. 34429 of January 5, 1918, which as finally amended required delivery, among other things, of 60 SE-1220 receivers on a cost-plus-10 percent basis. The date of delivery of the receivers does not appear but the abstract of the contract file (plaintiff's Exhibit 408-A) indicates that the work under this contract had been completed by the contractor prior to November 20, 1919, the close of the accounting period. Out of thirteen public bills listed in the contract files only two are dated subsequent to November 20, 1919, and both of these show no payments by the defendant for "Factory overhead expense" or for "Gen. and Adm. expense" for any date later than October 31, 1919. A release dated February 16, 1920, shows full performance of the contract by the contractor and full payment by the defendant.

34. Certain apparatus designated as follows has been omitted from the tabulation given in Finding 32 as not properly coming within the accounting:

(*Item 1*).—This item relates to a contract which called for the rebuilding of a 2-kw. Telefunken wagon set. The abstract of the contract contains the statement "No evidence of receiver being supplied in rebuilding of this set." Plaintiff's Exhibit 428, abstract of papers of the U. S. Signal Corps, contains reference to a letter showing receipt and

acceptance (Item 11). The wagon set as accepted contained one receiving set. There is no proof that the receiver itself was rebuilt or that, if rebuilt, it embodied the parallel condenser connection.

(*Item 15–16*).—The abstract of this contract and supplemental contract shows 301 SE–950 receivers called for and the abstract, under "remarks," contains the statement "37 receivers with payment therefor not accounted for."

(*Item 17*).—This item relates to a contract calling for 300 type SE–1012 receivers. The remarks under the abstract of this contract state "Only 288 receivers of the 300 called for are accounted for in the contract file."

(*Item 50*).—This item is already referred to in detail in connection with the Lodge patent (see Finding 12). This item called for 5 sets complete with receivers and contained no proof of delivery of three of the sets.

(*Item A–35*).—This item covers a contract calling for thirty radio receivers at a total contract price of $9,380. The contract file shows delivery of and payment during the Lodge accounting period for twenty-three of the receivers. There is no proof of delivery of or payment for the remaining seven receivers, the contract price for which was $1,918.

(*Item 6*).—The abstract of this item relates to a contract calling for 600 short-wave receivers. The abstract under remarks contains the statement "only 247 sets delivered on this contract."

(*Item 14*).—This item relates to a contract dated March 7, 1918, and calling for 400 receivers type SE–143. The public bills and vouchers listed in the contract show payment for only 306 receivers and there is no proof of delivery of or payment for the remaining 94 receivers.

(*Item 5*).—This item of a contract under date of August 4, 1919, called for 250 short-wave receivers. The remarks in the abstract contain the following statement: "Only 112 receivers made."

Receivers with permanently connected parallel condenser

35. The nine receivers listed in this group in the tabulation given in Finding 32 were installed at the Otter Cliffs

Station on Mount Desert, Maine. This was a radio station constructed by a Mr. Alessandro Fabri some time in the summer of 1917, which station was turned over to the Navy Department later in that year. This station was subsequently manned by a Navy staff and because of its geographical position and relative freedom from static, was used extensively by the Navy to receive from the high-power long-wave European stations.

The station was originally equipped with five Wireless Specialty Apparatus Company receivers, and Professor Pickard while stationed at the Otter Cliffs Station constructed at least four other receiving sets from Navy material. All of the nine sets had the tuning condenser of the open circuit permanently connected in parallel with the primary winding of the coupling transformer and all of these sets were utilized in the regular reception of messages by the Navy Department.

Receivers within Group I

36. The receiving sets tabulated under Group I possessed a control device for progressively adding antenna inductance to the open circuit as a knob was turned. By means of a cam arrangement, when the last positions of the knob were reached, the open circuit was altered from a series condenser connection to a connection in which the tuning condenser was in parallel with the load coil and primary coil of the open circuit.

Receivers within Group II

37. This group of receivers and tuners was provided with a variable tuning condenser in the antenna circuit, and had a switch by means of which the operator of the receiver could at will connect the condenser either in series or in parallel with the inductance coils of the open circuit, including the primary winding of the coupling transformer.

The item identified as "Ericson" near the end of the tabulation of Group II was a receiver installed at the United States Naval Reserve Force Radio Station at Bath, Maine,

and had a series parallel switch installed on the exterior of the cabinet at the left-hand end.

The ten receivers listed in this group under the item "Montcalm" were located and were used at the United States Naval Radio Station at the American Legation in Peking. The station was located within the legation grounds. The sets were built at the station, the condensers being obtained from stock at the Cavite Navy Yard, the coil forms made up by local labor, and the sets put together and assembled by Marines.

Receivers within Group IIIA

38. The receivers and receiving tuners listed within Group IIIA were designed by or under the supervision of Navy engineers. These sets were intentionally designed to enable the operator to employ either (a) the series condenser connection alone, (b) the series connection with a load coil, or (c) the parallel connection of the antenna tuning condenser.

Several constructional features of these sets contributed to such a universal use, among which were the location of the primary tuning condenser between the antenna connection and the primary of the coupling coil instead of the customary location of the condenser between the ground and the lower end of the primary winding where stray capacity effects are a minimum; bringing out the necessary leads and wires to binding posts located on the face or panel of the receiver so that modification of the connections could be made without any alteration of connections within the receiver cabinet, and to receive a longer wave-length range than the wave-length range of the primary circuit with a series condenser connection, in some instances by provision for loading coils in the secondary circuit.

The binding posts on the panel were suitably identified by engraved legends and the operators' instruction books accompanying the sets made specific reference to the parallel condenser connection, the purposes of it, and how to obtain it by suitable connections on the face of the panel. The following is quoted from the instruction book for the type SE-143 receiver, plaintiff's Exhibit 413B, which is made a

part hereof by reference, this quotation being given by way of example:

> The range of the primary of this receiver is 250 to 3,100 meters. The range of the tuned secondary is 250 to 6,800 meters. The primary may be increased from its nominal range of 3,100 meters to over 7,000 meters on any antenna by connecting as shown in figure #1.
>
> This places the primary variable condenser in parallel with the primary inductance. This combination is very efficient on waves longer than 3,000 meters; on short waves, it is not as efficient as the series capacity.
>
> The change-over from shunt to series connection can be made quickly by using a double pole double throw switch as shown in figure #2.

The figures 1 and 2 referred to in the above-quoted portion are circuit diagrams visually instructing the operator what connections to make to the panel binding posts.

All of the sets in Group IIIA were accompanied by instruction books which described to the operator of the set the proper connection to the binding posts by means of which the parallel primary condenser connection could be obtained.

Receivers within Group IIIB

39. The constructional features of the receivers in this group are identical to those listed in Group IIIA with respect to being designed so that the operator could make the necessary panel connections to employ either (a) the series condenser connection alone, (b) the series connection with a load coil, or (c) the parallel connection of the antenna tuning condenser. The instruction books accompanying the receivers in this group did not indicate to the operators what connection should be made to the binding posts on the panels in order to obtain the parallel condenser connection.

There is evidence that Navy wireless operators familiar with the radio sets had knowledge of the advantages of the parallel condenser connection and utilized such circuit in the reception of official Navy communications and in accordance with orders of their superior officers in connection with the use of Group IIIB as well as Group IIIA receivers.

40. Calculation of the cost of the alternative loading coils involves a number of fixed material and labor costs, irrespective of the size or value of the loading coil, these fixed charges being set out specifically in Findings 42 and 43.

Such fixed costs make it possible to use an average load coil value for a group of receiving sets and thus simplify the calculation.

The following table gives an average loading coil value in millihenries for the groups of sets tabulated, and in addition segregates the receivers acquired by contract from those manufactured by the Government or otherwise acquired:

Period	Group	Acquired by contract	Acquired otherwise	Total	Average load coil value
1910, 1911	II	15		15	4. 15
1912, 1913	II	101		101	4. 49
1914, 1915	II	45		45	10. 10
1917, 1918	Receivers permanently connected	5	4	9	74.
	II	5		5	15. 33
	IIIA	810	1	811	14. 34
	IIIB	370	60	430	47. 11
1919	I	800	50	850	2. 36
	II	2	10	12	71. 27
	IIIA	840	183	1, 023	12. 90
	IIIB	693	13	706	32. 46
Total		3, 686	321	4, 007	Ave. 18. 11

41. During the accounting period two types of loading coils were used, these types being designated as the "bank-wound" and "layer-wound" loading coil. The bank-wound coil was electrically more efficient in that the type of winding reduced the distributed capacity, and therefore reduced losses in the circuits. Bank winding required a particular art or skill, and there is no satisfactory evidence upon which to base the labor cost of such winding during the accounting period.

The layer-wound coils were wound on a hard-rubber spool, the second layer being wound upon a completed first layer, the third layer upon the second layer, etc. The cost estimate of the loading coils as used in the present case for a determination of just and reasonable compensation is based upon the layer-wound type of loading coil. This

type of coil is not so efficient electrically as the bank-wound coil, due to distributed capacity effects. Labor costs in connection with the winding of the layer-wound type of coil are less than the labor costs of winding the bank-wound coils, and the cost figures for loading coils, given in the following findings, are for this reason conservative.

42. The cost of the layer-wound coils is divided into material and labor. The following tabulation gives the material cost for the eleven sizes of loading coils set forth in Finding 40, *supra*. The cost of material for the coil form and hardware is the same for all sizes of the coil, being $1.77. The feet of wire for the different coil values are indicated on a graph (Commissioner's Exhibit CE–2, which is by reference made a part of this finding). This graph indicates the number of feet of wire necessary for any given value in millihenries of the loading coil.

The wire which was used during the accounting period for the manufacture of loading coils is known as Litzendraht wire, and cost two cents per foot during the accounting period.

Load coil value (millihenries)	Material costs			Total material cost
	Cost of coil form	Feet of wire	Cost of wire at 2 cents per foot	
4.15	$1.77	180	$3.60	$5.37
4.49	1.77	190	3.80	5.57
10.10	1.77	310	6.20	7.97
74.3	1.77	1,025	20.50	22.27
15.33	1.77	385	7.70	9.47
14.34	1.77	375	7.50	9.27
47.11	1.77	780	15.60	17.37
2.36	1.77	128	2.56	4.33
71.27	1.77	1,000	20.00	21.77
12.90	1.77	355	7.10	8.87
32.46	1.77	625	12.50	14.27

43. The cost of direct labor of the type employed in winding, assembling, and making radio coils during the accounting period was eighty-one cents ($0.81) per hour. The length of time in minutes required to wind load coils of various sizes is shown on a graph (Commissioner's Exhibit 7, which is by reference made a part of this finding).

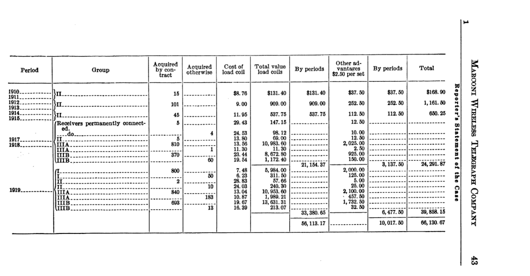
The following tabulation, which includes an indirect labor charge of 20 percent, is indicative of the labor costs involved in the various sizes of coils indicated. The fixed labor, as given in minutes, includes an average of seventy-five minutes for machining the coil form, and the remaining time of thirty-five minutes is inclusive of such fixed operations as getting stock, drilling for leads, mounting binding posts, placing form on arbor, tightening nut, setting turn counter, starting winding, bringing out finishing lead, cleaning and soldering leads to binding posts, removing coil and counter, baking and dipping, and testing.

Load coil value	Fixed labor in minutes	Winding time in minutes	Total time in minutes	Direct labor cost at $0.81 per hour	Indirect labor—20 percent of direct	Total labor cost
4.15	110	9	119	$1.61	0.32	$1.93
4.49	110	9	119	1.61	.32	1.93
10.10	110	13	123	1.66	.33	1.99
74.3	110	29	139	1.88	.38	2.26
15.33	110	15	125	1.69	.34	2.03
14.34	110	15	125	1.69	.34	2.03
47.11	110	24	134	1.81	.36	2.17
2.36	110	7	117	1.58	.32	1.90
71.27	110	29	139	1.88	.38	2.26
12.90	110	14	124	1.67	.33	2.00
32.46	110	21	131	1.77	.35	2.12

44. The following tabulation is indicative of the cost (material plus labor) of the eleven sizes of load coils given in the previous tabulations, and also contains in the last column what the approximate cost of the load coils would be if sold to the Government by a contractor, this column adding 20 percent profit to the cost of the coils:

Load coil value (millihenries)	Cost	Cost plus 20 percent profit	Load coil value (millihenries)	Cost	Cost plus 20 percent profit
4.15	$7.30	$8.76	47.11	$19.54	$23.44
4.49	7.50	9.00	2.36	6.23	7.48
10.10	9.96	11.95	71.27	24.03	28.83
74.3	24.53	29.43	12.90	10.87	13.04
15.33	11.50	13.80	32.46	16.39	19.67
14.34	11.30	13.56			

45. The following tabulation sets forth the total cost estimate of the loading coils, this being indicated both by period and group:



Period	Group	Acquired by contract	Acquired otherwise	Cost of load coil	Total value load coils	By periods	Other advantages $2.50 per set	By periods	Total
1910 1911	II	15		$8.76	$131.40	$131.40	$37.50	$37.50	$168.90
1912 1913	II	101		9.00	909.00	909.00	252.50	252.50	1,161.50
1914 1915	II	45		11.95	537.75	537.75	112.50	112.50	650.25
1917 1918	Receivers permanently connected.	5		29.43	147.15		12.50		
	do		4	24.53	98.12		10.00		
	II	5		13.80	69.00		12.50		
	IIIA	810		13.56	10,983.60		2,025.00		
	IIIA		1	11.30	11.30		2.50		
	IIIB	370		23.44	8,672.80		925.00		
	IIIB		60	19.54	1,172.40		150.00		
						21,154.37		3,137.50	24,291.87
1919	I	800		7.48	5,984.00		2,000.00		
	I		50	6.23	311.50		125.00		
	II	2		28.83	57.66		5.00		
	II		10	24.03	240.30		25.00		
	IIIA	840		13.04	10,953.60		2,100.00		
	IIIA		183	10.87	1,989.21		457.50		
	IIIB	693		19.67	13,631.31		1,732.50		
	IIIB		13	16.39	213.07		32.50		
						33,380.65		6,477.50	39,858.15
						56,113.17		10,017.50	66,130.67

46. Other advantages in receivers constructed to utilize the shunt condenser connection, as compared to those utilizing loading coils, are set forth in Finding 30. For convenience, these advantages are reiterated:

(a) The set is more compact, requires less room, and weighs less;

(b) At the longer wave lengths the sensitivity and selectivity are both greater.

These advantages are of maximum benefit in sets constructed to receive the longer wave lengths and are of little or no value in the short-wave sets involving a load coil of only a few millihenries, with relatively few turns of wire.

Referring to the average load coil value in the tabulation given in Finding 40, the maximum value is 74.3 millihenries and the minimum value is 2.36 millihenries. A fair and reasonable value of the advantages expressed in Finding 30 would be $10 per set for the long wave-length sets of 74.3 millihenries, and there would be no monetary value for a receiver which requires no load coil. The average load coil value for the 4,007 sets is 18.11 millihenries. Based on this average, the monetary value for this advantage per set for all the sets is approximately $2.50. This is included in the above tabulation as therein indicated.

47. A reasonable and entire compensation to plaintiff for use by the United States during the Marconi accounting period of the invention defined by claim 16 of the Marconi patent No. 763,772, is 65 percent of $66,130.67, or the sum of $42,984.93, together with interest at 5 percent per annum on the following sums from the respective dates given to the date of payment of the judgment, not as interest but as part of the entire compensation: $109.78 from December 31, 1911; $754.97 from December 31, 1913; $422.66 from December 31, 1915; $15,789.72 from December 31, 1918, and $25,907.80 from November 20, 1919.

The court decided that the plaintiff was entitled to recover $77,812.63, with an additional amount measured by interest at the rate of 5 percent per annum on the following sums for the dates specified until paid: $34,827.70 from August 16, 1915; $109.78 from December 31, 1911; $754.97 from December 31, 1913; $422.66 from December 31, 1915;

$15,789.72 from December 31, 1918, and $25,907.80 from November 20, 1919.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This is a patent case now before the court for the determination of the reasonable and entire compensation to which plaintiff is entitled for the appropriation of the right to use certain inventions covered by United States letters patent to Lodge 609,154, and to Marconi 763,772.

The court on November 4, 1935, filed findings of fact with an opinion (81 C. Cls. 671), holding that the Lodge patent was valid as to claims 1, 2, and 5 and had been infringed, and that claim 16 of the Marconi patent was valid and had been infringed. This case was remanded to a commissioner of this court in accordance with the stipulation of the parties that the issue of reasonable compensation be postponed until the determination by the court of the issues of validity and infringement of the various patents in suit.

The record shows notice of the closing of proof on December 20, 1940, under the order of remand. The commissioner's report was filed June 9, 1941, and both parties have filed numerous exceptions thereto. Inasmuch as the periods for recovery differ with respect to the patents involved, and as the theory upon which reasonable compensation has been found also differs, these patents will be separately discussed.

LODGE PATENT 609,154

The Lodge accounting period extends from March 8, 1913, when plaintiff first gave the notice of infringement to defendant, to August 16, 1915, which is the date of expiration of the patent.

The issues presented by the parties in their exceptions to the commissioner's report with respect to this patent may well be termed the customary or stock issues raised in a patent accounting. They may be briefly summarized as follows and will be considered in this order:

(1) The place of the Lodge patent in the radio art, i. e., whether it is commercially basic in character or whether it is merely an improvement;

(2) Whether the 10% royalty found by the commissioner is correct, plaintiff urging that this percentage is too low and defendant urging that it is too high; and

(3) Whether certain wireless apparatus should be included or excluded from the accounting or, more specifically stated (a) whether the Lodge patent relates to radio receivers sold separately; (b) whether certain spare parts of wireless apparatus should be included or excluded from the accounting, and (c) the question of the burden of proof relative to the acquirement of certain items of radio apparatus.

The status of a patent in the art with which it is associated is of importance in determining the base which is to be used in an accounting. The reason for this is succinctly set forth in *Garretson* v. *Clark*, 111 U. S. 120, in which it is stated:

> When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: "The patentee," he says, "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; *or he must show*, by equally reliable and satisfactory evidence, *that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.*" [Italics ours.]

From a consideration of subsequent cases, the application of this rule relates more directly to an accounting based upon profits rather than the type of accounting which is based on reasonable royalty and which has been followed in the present case with reference to the Lodge patent. This becomes apparent if we consider a theoretical instance, in which the profits, due to the patented portion of a machine, have on apportionment been found to be 25 percent of the total

profits on the machine, the remaining 75 percent being due to extraneous elements or elements patented by others. In such a case plaintiff would be entitled only to the profits on the features or elements covered by his patent. If, however, the recovery of compensation in the same instance were measured by a reasonable royalty, such a procedure would take into consideration both the nature of the patented invention and its relation to the entire machine as a whole. Thus, in applying a reasonable royalty rule to the same situation just outlined, the differential between the patented and unpatented features of the machine would be taken into account by scaling down the percentage of royalty accordingly. It would make no difference in the ultimate compensation to plaintiff if the reasonable royalty were fixed at 5 percent of the selling price of the complete machine rather than 20 percent of one quarter of the sales price of the machine.

The Lodge patent relates to the selective tuning or syntonizing of the antenna circuits of a transmitting station with a receiving station. Plaintiff urges that the invention is fundamental or basic in character and that the entire market value rule be followed. Defendant urges that apportionment be made and that certain wireless apparatus not directly involved in accomplishing the tuning, and exemplified by arc transmitters, detectors, and amplifiers, be omitted from the base from which compensation is measured.

The three claims of the Lodge patent which have been held valid and infringed are quoted in Finding 5 accompanying this opinion, and the basic position of the Lodge patent in the art is defined in the following quotation from the former findings of this court in its consideration of validity and infringement, in which it is stated that:

> Marconi in his patent #586,193 apparently did not appreciate the desirability of tuning the primary oscillating circuit by the use of an inductance coil, and did not contemplate varying the effective tuning of the receiver to one of several transmitters. * * *
>
> No one prior to Lodge appreciated the desirability of tuning the oscillating circuits of both the transmitter and receiver for the purpose intended and in the manner performed by him.

The ability to *selectively* and *adjustably* tune the antenna circuits of any receiving station to any desired transmitting station, or vice versa, was of fundamental importance to radio communication, and this is so obvious that it requires no lengthy explanation.

One of plaintiff's expert witnesses, Mr. Pickard, who has been engaged continuously in the field of radio communication from 1898 to the present time and during the major part of that time acted as a consulting engineer and was engaged in research and design work, testified with respect to the commercial and practical value of the Lodge invention as follows:

> Q. 31. What was accomplished by the insertion of the lumped inductance in the antenna and what was its effect upon the development of the radio art and the development of radio communications?
>
> A. What was accomplished by the lumped inductance was simply to permit any number of stations to operate within a given area, and so far as its effect upon the development of the art was concerned, it literally permitted the development of the radio art, which in the absence of such a means as the Lodge invention, would have been merely an interesting experiment.
>
> * * * * *
>
> Q. 37. Looking at the matter from the point of view of commercial utility will you in sum, so to speak, compare the utility of radio without the Lodge invention to its utility with it?
>
> A. Without the Lodge invention radio had no practical utility. With it it had a very practical utility.

One of defendant's expert witnesses, Commander Lavender, who had experience in radio communication work beginning in 1913, testified as follows in his cross-examination:

> X Q. 240. Could you have built, in 1913, 1914, and 1915 a practical receiver which did not embody the Lodge invention?
>
> A. No.
>
> * * * * *
>
> X Q. 248. And from your experience as one familiar with radio do you believe that—and I am asking for

your own testimony—the Bureau of Engineering would have said that they could have gotten along without the Lodge invention?

A. I do not believe that they could have gotten along without it.

We are of the opinion that while the Lodge invention dealt primarily with tuning, the invention was of such paramount importance that it substantially created the value of the component parts utilized in the radio transmitters and receivers purchased or acquired by the United States during the accounting period, and that it therefore falls within the entire market value rule. The complete cost of the transmitting and receiving sets should be used as the base in the application of a reasonable royalty.

The commissioner found a fair and reasonable royalty on the Lodge patent during the accounting period to be 10 percent of the selling price or market value of the radio transmitters, receivers and sets, and such apparatus as is dependent upon the invention thus defined for its utility. Defendant urges that the figure should be cut to 5 percent and plaintiff asks that it be increased to 15 percent. These requested values are based largely upon the opinion testimony of expert witnesses presented by both plaintiff and defendant.

The courts look with favor toward the establishment of a reasonable royalty as a measure of compensation in a patent accounting. This method usually obviates many difficulties connected with the establishing of such items as costs, profits, apportionments, expense of doing business, etc., all of which are matters frequently difficult to ascertain in a legal procedure.

If the plaintiff has already established a royalty by a license or licenses, he has himself fixed the average of his compensation, and if this has been established prior to the infringement, the task of the court then becomes easy. If such is not the case, a court will next take into consideration any act or acts of the plaintiff in connection with third parties which would tend to indicate an accepted monetary value for the use of the plaintiff's invention. Contracts made with others even during the infringing period or sub-

sequent thereto may be considered provided there is no room for suspecting collusion and the circumstances of the contracts would seem to repel any doubt of their good faith and negative the question of whether they had been entered into for the precise purpose of establishing an excessive royalty.

In the *Cincinnati Car Company* v. *New York Rapid Transit Corporation*, 66 Fed. (2d) 592, 595, Judge Learned Hand said:

> The plaintiff had made five settlements, four of them after infringement, and upon all of its three patents, one of which we declared uninfringed. * * * Though the payments were not established royalties, we need not disregard them, any more than the master did. It is true that they were settlements for infringements, but both parties may have been influenced by a wish to be done with litigation; that consideration is a sword with two edges.

See also *Meurer Steel Barrel Co.* v. *The United States*, 85 C. Cls. 554, 562 (certiorari denied, 302 U. S. 754).

Finally, in the order of consideration is the testimony of expert witnesses, those more or less familiar with the establishing of royalty rates in any particular art. We place this last not because of any lack of credibility or integrity of witnesses who testify with respect to a reasonable royalty but more because the opinion of any one witness is based upon his own individual approach to the art or industry concerned, and would take into consideration numerous factors which a second witness, equally honest, might entirely disregard. As each party will present to the court only those witnesses whose opinions in general favor his cause, such evidence, which is itself speculative, is sometimes of small help.

In Finding 13 we have set forth in detail four nonexclusive licenses which plaintiff granted to others during the Lodge accounting period to manufacture and sell wireless apparatus embodying the inventions of both the Lodge patent and Marconi patent 763,772. These licenses all indicate a minimum royalty under the two patents of 20 percent of the listed catalog or selling price, and the licenses

under date of October 15, 1914, to the National Electric Signaling Company, and under date of July 26, 1915, to the Clapp-Eastham Company, both provide for a royalty of 20 percent on all sets sold to the United States.

When the Lodge patent expired on August 16, 1915, the plaintiff granted numerous other nonexclusive licenses under the Marconi patent alone. These included a new license to the Clapp-Eastham Company. The license fee or royalty fee provided for in these license agreements subsequent to the expiration of the Lodge patent was 10 percent of the lowest selling price. Thus, these various contract agreements with third parties seem to indicate rather conclusively that the plaintiff and its licensees had in mind at that time an equal allocation of the 20 percent royalty between the Lodge and the Marconi patents, and that 10 percent is a just and reasonable royalty for the use of the Lodge patent alone during the accounting period. We think the commissioner is correct in his finding of 10 percent as a reasonable royalty for this patent.

We next consider the issue of whether certain apparatus should be included in or excluded from the accounting base to which the royalty is applied. The first group of apparatus to consider comprises approximately 200 wireless receivers contained in eleven different contract items. These are receivers which were sold separately to the Government and not in conjunction with transmitting apparatus or complete station equipment.

Defendant's argument is that the claims of the Lodge patent which have been held valid and infringed by the court are directed to the capacity and lumped inductance, and we quote from defendant's brief, "in the antenna at the local station and at a distant station." Insofar as we are able to follow defendant's argument, it assumes that the Lodge claims are directed to a system of wireless communication involving a transmitter and a receiver tuned thereto, and that where a transmitting set and a receiving set have been sold to the Government as a combination it is proper that they should come within the accounting, but where a receiver has been sold separately it represents an incomplete

combination or a portion only of the patented system, and therefore does not come within the accounting.

The language of the Lodge patent itself negatives this assumption of a system comprising a single transmitter cooperating with but one receiver, and instead contemplates a transmitter sending to a plurality of receivers. See lines 8–17, page 1 of the specifications, reading as follows:

> The object of my invention is to enable an operator, by means of what is now known as "Hertzian-wave telegraphy," to transmit messages across space *to any one or more of a number of different individuals in various localities, each of whom is provided with a suitably arranged receiver*, and to effect the ancillary improvements the nature of which are hereinafter more particularly described and claimed. [Italics ours.]

Defendant further argues that inasmuch as it is entitled to use certain systems involving both transmitters and receivers using the Lodge invention, but acquired *prior* to the Lodge accounting period, it has an implied license to continue the use of such systems and therefore has a right to purchase new receivers for use with the old transmitters, or, expressed in other words, defendant has a right to repair its prior acquired systems by the substitution of a new receiver for an old or worn-out receiver.

Defendant's argument is based on a false premise. The claims in suit of the Lodge patent are not limited to a system involving a combination of a transmitter with a receiver. In this court's former special findings of fact we specifically found (Finding XXVII) that:

> The Lodge patent relates to the provision of a self-inductance coil between a pair of capacity areas in an oscillating circuit of *either or both a sending or receiving set* for Hertzian wave telegraphy. [Italics ours.]

Moreover, claim 5 is directed to the antenna circuit of either a transmitter or receiver, the circuit including a variable acting self-inductance serving to syntonize such antenna circuit to any other such antenna circuit.

With respect to the radio equipment acquired prior to the accounting period, defendant undoubtedly has a right, under the patent law as interpreted by the courts, to repair a

system, but, on the contrary, it has no right to reconstruct a system, and the installation of a new receiver would, in our opinion, amount to a reconstruction. (See our subsequent discussion in connection with repair parts.)

From the practical standpoint we can also see no assurance that any of the new receivers purchased separately would not be used whenever necessary to receive radio transmission from a transmitter acquired within the accounting period, and under the defendant's own theory of the Lodge invention being limited to a system, such use would then be an infringement.

We think that the receivers sold separately are properly within the accounting.

Certain extra parts are listed under a heading entitled "Value of parts" in the tabulation accompanying Finding 8 and are also individually itemized and set forth in greater detail in Finding 9. These parts, as taken from the various contracts, have a total value of $56,448.82, and defendant urges that they comprise repair parts, and therefore should be omitted from the base figure to which any reasonable royalty by way of compensation is applied.

The general theory relating to spare parts is in substance that the user of a patented machine or device having once paid the patentee a royalty or other consideration for the right to its free use and enjoyment, is thereafter entitled to keep the machine or device in repair and to replace broken or worn-out unpatented parts of its mechanism with a corresponding part not necessarily purchased from the patentee. This principle is stated in Walker on Patents (6th Edition), Sec. 350:

> A purchaser may repair a patented machine which he has purchased, by replacing broken or worn-out unpatented parts, so long as the identity of the machine is not destroyed, provided the machine itself is not an infringement. * * * And he may improve such a machine for his own peculiar use, by substituting for an unpatented part thereof, a corresponding part originally purchased, or not purchased, from the patentee. But no unauthorized person can lawfully engage in the business of reconstructing patented machines for their owners, by omissions and substitu-

tions of parts, where those machines do not require any repair, but are thus changed with a view to their improvement.

Reference is also made to the opinion of the Supreme Court in *Leeds & Catlin* v. *Victor, etc. Company*, 213 U. S. 325, 336, in which the question of repair or replacement parts was considered in connection with the furnishing of additional phonograph records for a sound-production apparatus, as follows:

> Can petitioner find justification under the right of repair and replacement as described in *Wilson* v. *Simpson*, 9 How. 109, and *Chaffee* v. *Boston Belting Co.*, 22 How. 217? The Court of Appeals, in passing on these cases, considered that there was no essential difference between the meaning of the words "repair" and "replacement". That they both meant restoration of worn-out parts. This distinction was recognized in *Wilson* v. *Simpson*, *supra*, where it is said that the language of the court in *Wilson's and Roussan's Case*, 4 How. 709, did not permit the assignee of a patent to make other machines or reconstruct them in gross upon the frame of machines which the assignee had in use, "but it does comprehend and permit the resupply of the effective ultimate tool of the invention, which is liable to be often worn out or to become inoperative for its intended effect, which the inventor contemplated would have to be frequently replaced anew, during the time that the machine as a whole might last." But there is no pretense in the case at bar of mending broken or worn-out records, or of repairing or replacing "the operative ultimate tool of the invention" which had deteriorated by use. The sales of petitioner as found by the courts below, and as established by the evidence, were not to furnish new records identical with those originally offered by the Victor Company, but, to use the language of Judge Lacombe in the Circuit Court, "more frequently in order to increase the repertory of tunes than as substituted for worn-out records."
>
> *The right of substitution or "resupply" of an element depends upon the same test. The license granted to a purchaser of a patented combination is to preserve its fitness for use so far as it may be affected by wear or breakage. Beyond this there is no license.* [Italics ours.]

See also *Miller Hatcheries* v. *Buckeye Incubator Co.*, 41 Fed. (2d) 619, for a complete discussion of this question.

The ultimate question is apparently one of "repair" versus "reconstruction" and its practical determination to a large extent rests on the purpose for which the parts were intended.

Plaintiff's witness Clark testified with respect to the spare parts as follows:

> Q. 1506. Did you personally have anything to do with the requirement for the delivery of spare parts in Navy contracts or in Navy specifications?
>
> A. Yes, sir, I did.
>
> Q. 1507. What, Mr. Clark?
>
> A. I wrote the specifications which called in detail for such spares to be supplied.
>
> Q. 1508. Will you please explain the reason for the purchase of spare parts for those transmitters?
>
> A. Spare parts were replacement parts for such things as experience had shown might be destroyed during the normal use of the set—during the normal or military use of the set.
>
> Q. 1509. Did the supply of spare parts have any relation to keeping the apparatus available for use at all times, no matter where the ship or station might be?
>
> A. Yes. That is what the previous question meant—the previous answer meant.
>
> Q. 1510. Will you amplify a little, please? In the absence of spare parts could continuous service be available at all times on a ship at sea, for example?
>
> A. No. My previous answer meant that the spares were to insure continuous operation. That means that if any part were to break down due to any reason it would be replaced immediately by the spare and therefore the set would continue to be operative.

From this it is clear that the primary purpose of these spare parts was for "a repair" instead of "a reconstruction" of the sets. It is especially vital in military use to have sufficient replacement or repair parts on hand so as to maintain substantially continuous operation at all times.

The question may be raised that the spare parts were furnished for infringing sets and not for radio equipment which the defendant had a right or license to use, and for

this reason they do not fall within the spare parts rule and should be included in the accounting.

It is our view, however, that in the present method of awarding reasonable compensation based on a reasonable royalty and including interest from the time of acquirement of the radio equipment, defendant is placed in the position of a trustee ex maleficio, and as one who has paid a license fee at the time of acquirement and therefore is entitled to the use of the devices and also to their repair. In stating this we are not overlooking the possibility that some of these parts may have entered into the "reconstruction" of some of the sets that the defendant had previously acquired, or that even entire new sets had been built and some of these parts used. In the latter case, where satisfactory proof has been introduced, such sets have been included and form a portion of the base to which the royalty applies. In the former case we have no evidence before us which would enable any allocation of these parts to be made with reference to repairs versus reconstruction, and we must therefore depend on what is stated to be the primary purpose of these parts as set forth in the above-quoted testimony of the witness Clark.

The spare parts should be omitted from the base to which the reasonable royalty is applied.

We next come to the question of burden of proof with respect to about twelve items, this question being presented by plaintiff in that it urges that certain of these items which were omitted from the accounting should be included therein, and that certain other of these items should be given a larger market valuation than was given them by the commissioner.

A patent accounting frequently presents a problem of this nature. While it is the duty of the plaintiff in the accounting to present prima facie evidence of the number of devices and their monetary value, the evidence upon which plaintiff is forced to rely for this purpose is usually in the form of records and documents in the possession of defendant, and this is especially true where the devices have been acquired by the infringer from third parties, as in the present case.

Where confusion in the books or records of the defendant is found, or where profits from the infringing device have been commingled with other profits of the defendant, it is obviously impossible for the plaintiff to proceed beyond a certain point in its prima facie proof, and one party or the other must suffer. We find no better exposition of this subject than that given in *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 621, from which we quote at some length:

> None of the cases cited discuss the rights of the patentee who has exhausted all available means of apportionment, who has resorted to the books and employes of the defendant, and by them, or expert testimony proved, that it was impossible to make a separation of the profits. This distinction, between difficulty and impossibility, is involved in the ruling by the Circuit Court of Appeals for the Sixth Circuit in *Brennan & Co.* v. *Dowagiac Mfg. Co.*, 162 Fed. Rep. 472, 476, where the *Garretson Case* was distinguished, and the court said:
>
> "In the present case the infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of plaintiff's invention. * * * In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest upon the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the court to say to the innocent party, 'You have failed to make the necessary proof to enable us to decide how much of these profits are your own;' for the party knows, and the court must see, that such a requirement is impossible to be complied with. The proper remedy to be applied in such cases is that stated by Chancellor Kent in *Hart* v. *Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 108, where he said: 'The rule of law and equity is strict and severe on such occasion. * * * All the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it.' "
>
> It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impos-

> sible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion.

See also *Computing Scale Co.* v. *Toledo Computing Scale Co.*, 279 Fed. 648, 673, which refers to the *Westinghouse* decision as follows:

> And the first fruits of the Westinghouse decision should be this: If a manufacturer, knowing of a patent, decides to chance an unlicensed use, he should realize that he may be caught by a final decree on the merits and be ordered to respond accordingly; and, so realizing, he should be held to the duty of keeping separate and accurate records of all his infringing acts; and, on his failure to keep such records, the court, in measuring the damages on account of his trespasses, should resolve all doubts against him.

In the present case there was a commendable cooperation between counsel with respect to the examination of defendant's records. In lieu of calls, the complete files in the General Accounting Office with respect to specified contracts for the purchase of radio apparatus were rendered available to a representative of plaintiff who made abstracts of them, these abstracts being submitted to a representative of defendant for correction and the addition of any material it desired. Any informal requests for the production of documents from the defendant's records that could be located were granted and plaintiff's representative permitted to examine them and make abstracts. It is from these abstracts, with very few exceptions, that the plaintiff has based its proof of the number of sets and their market value.

With respect to the majority of the items questioned by plaintiff, plaintiff urges that the contract files show a contract for delivery of a certain number of radio sets at the given market value, and contain no record either of cancellation, payment for, or acquirement of the sets by the defendant, and under these circumstances plaintiff asserts that the delivery of and payment for the apparatus in accordance with the terms of the contract, and in the absence of any proof to the contrary on the part of defendant, must be inferred or presumed.

In so far as three of the contested items are concerned they should be included. Item A-27 (see Finding 11) called for a transmitting and receiving set at a price of $2,450. The abstract of this contract shows no record of payment in the contract file. In plaintiff's Exhibit 428 however (Item 9) there is an official notice dated March 17, 1913, referring to this contract and stating, "The balance of the material on order 12387 was to-day inspected and accepted." We think in this instance that the burden of proof as to the non-acquisition of this set is on defendant, and this item has been included in the accounting.

With respect to the Tuckerton transmitting set (Finding 11) there is no contract file in evidence, but plaintiff's witness Clark has testified that a 60-kw. arc transmitting set was supplied by the Federal Telegraph Company and he personally installed this set at the Tuckerton station. Mr. Clark, who also had a great deal to do with the preparation of the various Navy contracts and was well acquainted with the value of the apparatus, also gave as his opinion that the value of this set was $8,000. We think that this oral testimony of Mr. Clark is sufficient to establish acquirement of this set and its value in the absence of any proof by defendant to the contrary.

Defendant's witness Eaton described three radio receivers which he had constructed and used on behalf of and as an employee of defendant during the Lodge accounting period. The source of or date of acquirement of the various component elements used in the construction of these receivers is unknown, but even granting that the component parts of these sets were acquired prior to the Lodge accounting period, these sets did not become an entity until they were constructed or manufactured. This act took place during the Lodge accounting period. The minimum established value of a receiving set during the Lodge accounting period was $250, and these three receivers, at a total of $750, are therefore included in the accounting (see Finding 11). The defendant has presented no proof to the contrary with respect to this item.

It is to be noted in connection with the first of these three items (Item A-27) that while the contract file itself indi-

cated no proof of payment, there was separate proof of acceptance or acquisition of the radio apparatus by the defendant. We emphasize this in passing to a consideration of some of the other items which plaintiff urges for inclusion in the accounting. While admissible in evidence to lay a foundation, we do not think that the mere existence of a contract under the circumstances in the present case carries the presumption of acquirement of the apparatus specified.

In the present situation and from a consideration of the plaintiff's abstracts and documents in their entirety, it can not be said that the Government has kept a confused or inaccurate record. Instead, we are convinced from an examination that these records as a whole are more complete and accurate than similar records kept by the average private firm or individual and relating to events occurring as far back as 1913–1915. Neither can it be said that the defendant did not extend cooperation to plaintiff in its examination of its records. We also do not think that plaintiff has satisfactorily established as a fact that where a contract file in the General Accounting Office does not show either a cancellation of the contract or a fulfillment of the contract, the records have been inaccurately kept. It would appear that this statement, upon which plaintiff predicates the shifting of the burden of proof, is more of an assumption than an established fact.

With reference to the shifting of the burden of proof to the defendant, we refer to the *Westinghouse case* cited, *supra*, directing attention to the fact that such burden is not shifted until the plaintiff has proved the *impossibility* of either accurate or approximate apportionment, this case referring to the distinction between *difficulty of proof* and *impossibility of proof* in the first paragraph of the subject-matter cited therefrom, *supra*.

We now refer to Item A–5 (Finding 12), which is one of the items plaintiff urges should be included in the accounting. This item is an abstract of a contract with the Federal Telegraph Company dated November 2, 1914, and called for one transmitter and one receiver at a contract price of $5,500. The abstract of this contract states that

there is no payment by public bill or any other record of payment, nor does the abstract of the contract specify the delivery date of the apparatus. From what we have previously said, we cannot assume from this abstract that defendant acquired this apparatus or that further evidence by plaintiff with respect to this item is an impossibility rather than a difficulty.

What we have said about this item applies also to the various other items set forth in detail in Finding 12 and with reference to which it is therein stated that there is no satisfactory evidence either of delivery of or payment for the items within the accounting period.

What we have said with respect to Item A–5 as to proof applies also to such items as 50 and A–35 in Finding 10. Item 50 calls for five radio sets and shows delivery of two of them during the Lodge accounting period. There is no proof of delivery of or payment for the remaining three sets during the accounting period. Item A–35 similarly shows a contract for thirty radio receivers and delivery of and payment during the Lodge accounting period for twenty-three of the receivers, with no proof of delivery of or payment for the remaining seven.

It is unnecessary to refer in detail to the remaining items which plaintiff urges should be included or altered as to market value in the accounting (Items A–1, A–29, A–39, B–20, B–21, B–52, and C–1) and which we have set forth in detail in Findings 9, 10, and 12. The commissioner was correct in either excluding the items or in giving them the market values proved by the records of payment in the files.

From the tabulation accompanying Finding 8 the entire market value of the apparatus acquired during the Lodge accounting period is $348,276.94.

We find that just and reasonable compensation is 10 percent of this entire market value, or $34,827.70, together with an amount measured by interest at 5 percent per annum, not as interest but as a part of the entire just compensation, on $34,827.70 from August 16, 1915, to date of payment of the judgment.

Defendant in its exceptions to the commissioner's report

has requested that the court use an interest figure of 2 percent because, and to quote from its exceptions:

> Just compensation should not include interest at a higher rate and should not include interest prior to April 8, 1936, because the plaintiff by joining the claim under the Lodge patent with claims under three other patents contributed to protraction of the litigation beyond all reason, when the claim under the Lodge patent could easily have been separated and promptly tried.

We do not follow this line of reasoning. It is apparently based on a false premise, for if the Lodge patent were to be separated, then presumably each of the other patents should likewise have been separated, with the result that there would have been four distinct suits in which a substantial part of the record would have had to be duplicated. The joinder of the four patents in one suit, all owned by plaintiff and directed to the same basic subject-matter, simplified the litigation by making it possible to consider only once all fundamental matters relating to radio, relationships between the parties, and the facts as to the acquirement and structure of the infringing apparatus.

Defendant does not suggest that there has been any unreasonable delay in the prosecution of this case, with its necessarily voluminous record. In fact, in its objections to plaintiff's proposed findings of fact before the commissioner, filed September 9, 1940, defendant stated (p. 20):

> The highly technical character of the subject-matter, the difficulty of assembling competent witnesses, and the time required for preparation by both parties are believed to be such as to indicate reasonable speed by both parties.

We feel from a consideration of the record that 5 percent is a proper rate of interest in the present case.

MARCONI PATENT 763,772

Plaintiff having filed supplemental petitions, the accounting period for the Marconi patent extended from July 29, 1910, to November 20, 1919, at which time the plaintiff assigned the patent. Claim 16 upon which this accounting

is based relates to a particular circuit connection between the antenna tuning condenser and the primary of the transformer in a radio receiver, hereinafter referred to as the parallel or shunt connection. Findings 20 and 21 recite the claim and describe the circuit in detail.

In connection with this patent the defendant presents an issue unusual in accounting proceedings, i. e., the issue of noninfringement. The two other basic issues presented by the parties are whether certain radio receivers should be included in or excluded from the accounting, and what proportion of the monetary value resulting from the use of the invention by the defendant should be utilized in arriving at a reasonable and entire compensation.

In its opinion of November 4, 1935, on the question of validity and infringement of the Marconi patent, which was at that time before the court, the third conclusion of law of this court read as follows:

> That the Marconi patent #763,772 is invalid except as to claim 16 thereof, which is infringed by the apparatus specified in Finding LXIII and any other apparatus used by defendant coming within its terminology.

We also quote Finding LXIII, referred to in this conclusion of law:

> The receiving apparatus of the Kilbourne & Clark Company, shown in exhibit 95, and the receiver made by the Telefunken Company, illustrated in exhibit 79, each has apparatus coming within the terminology of claim 16.

In connection with the presentation to the court of the question of validity and infringement, it had been stipulated that the issue of reasonable compensation for damages and profits be postponed until the determination by the court of the issues of validity and infringement of the various patents in suit.

The decision of this court relative to infringement and validity (November 4, 1935) was prior to the *Esnault-Pelterie* decision of December 7, 1936 (299 U. S. 201), which held that infringement was a question of fact rather than one of law. Prior to the *Esnault-Pelterie* decision this court

uniformly considered that whether or not certain apparatus came within the terms of a patent claim was a question of fact, but that whether the claim was infringed by such apparatus was a question of law.

The defendant some six years after the original decision of this court on the question of infringement, and after the expenditure of much time and money in the Marconi accounting, now for the first time argues that there was *no finding of fact* that the defendant has infringed and asks for a finding of noninfringement. Thus as we see it, defendant's present position, based upon this technicality, is that this court in spite of the stipulation that the accounting be deferred until validity and infringement had been determined, sent this case to the commissioner for the accounting without deciding the issue of infringement of claim 16. This we did not do. The meaning and intent of the prior decision on infringement was clear and was understood by the defendant who at no time by motion for a new trial or otherwise has until now questioned the correctness or the sufficiency of the court's findings or conclusions.

In its eagerness to advance this theory of noninfringement defendant has evidently overlooked the fact that should the court still consider this question as pending in Marconi patent #763,772, plaintiff could with equal facility urge that the prior conclusion of the court holding the Marconi reissue patent and the Fleming patent noninfringed, was equally nondeterminative.

The question of infringement of Marconi claim 16 by the apparatus designated in Finding LXIII of the prior decision is not before us in the present accounting. In order to forestall further controversy, however, we have found validity and infringement as an ultimate fact (Findings 1 and 23) in our special findings of fact.

In its argument as to noninfringement defendant also attempts to rely upon a ruling of this court on defendant's motion with respect to certain calls under date of October 22, 1937. The court's order read:

> The location and function of the condenser in the Government radio sets under consideration in the present motion is a question of fact, and their identity or

Opinion of the Court

difference of construction and mode of operation with respect to claims which have been held valid and infringed are subject to proof before the Commissioner. The within motion is overruled.

Defendant suggests that by this order the court reopened the entire subject of infringement of claim 16. This is incorrect. This order resulted from the fact that plaintiff had made motions for calls on certain Departments relating to additional apparatus which plaintiff claimed infringed claim 16 of the Marconi patent. Plaintiff's motions were allowed but defendant requested this court to reconsider its allowance of the motions, and in support of its argument numerous radio circuit diagrams were submitted to the court without any expert testimony as to what they disclosed. The court denied defendant's motion to reconsider the allowance of plaintiff's motions for calls, and left it to the commissioner to determine by means of evidence presented before him the location and function of condensers in defendant's receivers. The order in substance required the commissioner to determine whether these additional receivers should be included in or excluded from the accounting.

The defendant also argues that even though claim 16 be valid, it is limited in scope by the prior art, and as thus limited the Government receivers follow the teachings of the prior art rather than claim 16 of the Marconi patent, and therefore do not come within the accounting. Defendant asserts that the commissioner failed to make certain findings bearing out this contention. This of course is but raising the question of infringement in another guise.

The court in its original decision established the scope of claim 16 when it held the same infringed by the receivers of the Kilbourne & Clark Company and the Telefunken Company, as set forth in Finding LXIII. This apparatus, its circuits and its elements establish the interpretation of the claim with respect to the accounting.

The sole purpose and function of an accounting in a patent infringement case is to ascertain the amount of compensation due, and no other issue can be brought into the accounting to change or alter the court's prior decision.

With reference to the additional receivers presented, if their identity of construction and mode of operation are similar to the apparatus which the court has held to be an infringement, then they also infringe, and this is as far as the proof has to go. See *Flat Slab Patents Co.* v. *Turner*, 285 Fed. 257, 273:

> The problem of the master, therefore, in ascertaining whether a new construction is to be covered by the accounting, becomes *one of comparison between that construction and the one declared to infringe.* This comparison is along the line of infringing elements or features. The identity of such elements or features and the respect in which they constitute infringements can be found by the master sometimes in his report or more often in his opinion which may be treated as an explanation of the report. No aid in understanding the action of the court can be found in facts not before the court as evidence and not judicially noticeable. Evidence of the prior art can find no initial entrance into the case through the accounting. The place of prior art in patent law is to invalidate or limit the scope of the patent. The suggestion that it can be introduced for the first time in the accounting for the purpose either of modifying or of interpreting the infringement adjudication is not sound. The duty of the master is to apply, not to alter the decision of the court appointing him, and he is not aided in understanding that decision by facts which the court did not have in mind when it acted. [Italics ours.]

It is clear from the record that the construction and mode of operation of the additional receivers were similar to the Kilbourne & Clark receiver and the Telefunken receiver when the antenna tuning condenser was connected in the parallel position. None of defendant's witnesses has asserted to the contrary, and we have so found in Finding 24.

The technical details of construction of the various groups of receivers contained in the itemized schedule accompanying Finding 32 are set forth in Findings 35 to 39, inclusive. The usual controversy has arisen as to the inclusion or exclusion of certain individual items of equipment. We have fully discussed the matter of proof in this respect in that portion of the opinion relating to the Lodge patent,

and it is unnecessary to repeat it here. These items have been considered in accordance with our previous statement and are set forth in Findings 33 and 34.

With respect to the various groups contained in the itemized schedule (Finding 32), the first group, "Receivers with permanently connected parallel condenser," needs no explanation. As constructed, these receivers have what we term for convenience "the Marconi circuit" in permanent form.

As to Group I, the receivers therein had an automatic device connected with the inductance controlling knob of the set so that when the knob was in its last positions the circuits inside the set were so arranged as to produce the Marconi circuit.

Receivers within Group II were provided with a switch so that the operator could connect at will the condenser either in series or utilize the Marconi circuit.

The item in this group identified as "Montcalm" refers to a group of receivers which were made and used at the United States Naval Radio Station at the American Legation in Peking and within the legation grounds. This item, which is trivial, as it involves only 10 receivers out of a total of 4,007, presents an apparently new issue in patent law. Does manufacture and use in such a location violate the monopoly created by the patent and which extends "throughout the United States, and the Territories thereof," as expressed by Section 4884 of the Revised Statutes?

We know of no case directly in point. *Gardiner* v. *Howe*, 9 Fed. Cases 1157, however, is a patent case in which the master of a vessel under American registry applied a device to a sail and used the same while on the high seas between Liverpool and New York. The owner of the vessel was made the defendant in a patent suit for this act. The court held that use of the invention of a United States patent on a vessel of American registry, while it is on the high seas and without the jurisdiction of the United States, constitutes infringement of the patent. Justice Clifford said:

> The patent laws of the United States afford no protection to inventions beyond or outside of the jurisdic-

tion of the United States; but this jurisdiction extends to the decks of American vessels on the high seas, as much as it does to all the territory of the country, and for many purposes is even more exclusive.

The converse of this proposition is set forth in *Brown* v. *Duchesne*, 19 How. 183, where Mr. Justice Taney held that the exclusive rights granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports and that the use of the patented improvement in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee provided such use is lawful under the laws of the country to which the vessel belongs.

We think from these two cases the use of a United States patent on the grounds of the American Legation at Peking constitutes infringement thereof, and the ten receiving sets are properly within the accounting.

Receivers in Group IIIA were what might be termed universal receivers. These sets were intentionally designed under the supervision of Navy engineers to employ three different circuit connections at the will of the operator, who could use either a series condenser connection, a connection involving an external load coil, or the Marconi circuit. In order to accomplish this, the sets were designed with the condenser connected between the ground and the primary coil instead of its more conventional location between the antenna and the primary coil, and instead of having all the wiring of the sets permanent in character and behind the panel, the necessary wires were brought out to binding posts mounted on the face of the panel. The binding posts were identified by engraved legends, and by means of making various connections to them the operator could select any of the three modifications which he desired. An instruction book with diagrams for the operators accompanied these sets and this book told the operator what connections to make in order to obtain the Marconi circuit and also referred to its utility.

The receivers in Group IIIB were identical with those in IIIA as to construction and the location of the binding posts

on the panel for obtaining any of the several types of receiving circuits, including the Marconi circuit. The receivers in this group, however, were not accompanied by an instruction book with specific references to the Marconi circuit.

The evidence in the case is clear that the Navy wireless operators had knowledge of the advantages of the Marconi circuit and utilized this circuit from time to time in the reception of official Navy communications and in accordance with the orders of their superior officers in the use of Group IIIB receivers as well as Group IIIA receivers. Both of these groups are therefore properly included in the accounting. See *Wright Co.* v. *Herring-Curtiss Co.*, 211 Fed. 654, 655, as follows:

> As to the other claims, in which the vertical rear rudder is an element, we are satisfied from the testimony, as was the court below, that during some parts of their flight defendant's machines use the rudder synchronously with the wings, so that by their joint action lost balance may be restored or a threatened loss of balance be averted. Such use of the rudder constitutes infringement, and a machine that infringes part of the time is an infringement, although it may at other times be so operated as not to infringe.

See also *Corrugated Fiber Co.* v. *Paper Working Machines Co.*, 259 Fed. 283.

The Marconi invention as predicated upon claim 16 relates only to a portion of the receiving set, i. e., the primary tuning condenser and its circuits. As the contract costs of sets acquired by the Government in most instances relate to the complete receiver and include detector devices and improvements which should be properly allocated to other patentees, there would be great difficulty in segregating the value of those portions of the receivers involved in this accounting. Use has therefore been made of the standard of comparison method.

If the defendant had not used the Marconi circuit it would have been possible to accomplish substantially the same basic results by the use of another type of tuning circuit available to the defendant but at an increased cost. Compensation may therefore be arrived at by ascertaining

these costs. As the detailed method and computations are set forth fully in Findings 26–30 and 40–44, inclusive, it is unnecessary to refer to this method here except to state that it involved calculations of the cost of the alternate structure available to the defendant and included materials, labor, and overhead.

The final tabulation in Finding 45 gives the total cost estimate of this alternate structure, being indicated both by suitable periods of time and by groups.

The total figure is $66,130.67 for the 4,007 receivers coming within the accounting.

Plaintiff contends that it is entitled to this total value, together with suitable interest thereon, as reasonable and entire compensation. With this we do not agree. This value does not represent profits lost by the plaintiff through the failure of the defendant to purchase from it receiving sets equipped with the Marconi circuit. Nor is this figure the measure of the infringer's profits such as occurs frequently in patent litigation, where the defendant has obtained a market by the unauthorized use of an invention and which profits then become a measure of damages.

Instead, this figure represents the entire sum that it would have cost the defendant to avoid the use of the Marconi invention by accomplishing the same results in another way. If the parties to this suit had been in negotiation for the use of the Marconi invention we can readily assume that the price agreed upon would be something less than it would have cost defendant to use an equivalent device, for, unless this were done, the defendant as a party to this negotiation would receive absolutely no benefits. See *Olsson* v. *The United States*, 87 C. Cls. 642, 659, quoting from *Mamie C. Wood et al.* v. *United States*, 36 C. Cls. 418, 426:

> But this court, in the leading *Case of McKeever* (14 C. Cls. R., 396; affirmed by the Supreme Court, see 18 id., 757), laid down a sufficient rule for such cases. The question to be determined is, What was the invention worth in the market? What would the parties have taken and paid if the matter had come to an express agreement? What would any person needing the invention have been willing to pay for it? * * *

Upon the record in this case, we are of the opinion that 65 percent of $66,130.67, the total monetary value of the utility and advantages to the Government, or the sum of $42,984.93, constitutes a reasonable and entire compensation to plaintiff for the use by the United States of the Marconi invention, together with interest at 5 percent on this amount, not as interest but as a part of the just compensation, this interest to be calculated in accordance with the periods and amounts specified in the tabulation in Finding 47.

In this accounting, which relates to Lodge patent No. 609,154 and Marconi patent No. 763,772, plaintiff is entitled to judgment in the sum of $34,827.70, with interest at 5 percent per annum thereon, not as interest but as a part of just compensation, from August 16, 1915, until paid, as to the Lodge patent; and as to the Marconi patent the sum of $42,984.93, with interest on the several amounts and from the dates specified in Finding 47 until paid, not as interest but as part of just compensation.

It is so ordered.

GREEN, *Judge;* MADDEN, *Judge;* JONES, *Judge;* and LITTLETON, *Judge*, concur.

ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY, INC., v. THE UNITED STATES

[No. 43548. Decided October 5, 1942. Defendant's motion for new trial overruled March 1, 1943]*

On the Proofs

Government contract; increased costs and delay caused by acts of Government agents.—Where plaintiff, contractor, entered into a contract with the Government to furnish all labor and materials and perform all work required for wrecking existing buildings and constructing and finishing complete certain speci-

*Petition for writ of certiorari granted October 11, 1943.

Syllabus

fied buildings for the Veterans Administration Facility at Roanoke, Va., within a specified time fixed by the Government; and where it is established by the evidence that increased costs and expenses for material, labor and overhead not included in plaintiff's bid nor in the contract price and extra work and delay not contemplated nor required by the provisions of the contract and specifications resulted from and were caused by the acts of the Government's authorized agents and officers; it is *held* that plaintiff is entitled to recover.

Same; contract prepared by defendant.—Where the contract under which plaintiff's claim is made was wholly prepared and written by the defendant; it is *held* that the usual defenses to acts, conduct, rulings and decisions cannot be sustained where in order to sustain them it is necessary to resolve all doubts in favor of the party who prepared and wrote the contract and specifications. *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538.

Same; contractor relieved from strict compliance.—Where the acts, conduct, rulings and decisions of the designated and authorized officers and agents of one party to the contract in connection with the performance thereof by the other party are so unreasonable, arbitrary and capricious as to make it difficult or impossible for the other party to comply literally with some provision of the contract; such other party is relieved from strict compliance, and substantial compliance will suffice.

Same; breach of contract; waiver.—Acts and conduct which are arbitrary, capricious or unauthorized and so grossly erroneous as to imply bad faith amount to a breach of the contract or constitute a waiver of strict compliance by the other party. *United States* v. *Gleeson*, 124 U. S. 255; *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236; *Ripley* v. *United States*, 223 U. S. 695; *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445.

Same; damages from delay unreasonably caused.—Where the defendant unreasonably delays a contractor it is liable to the contractor for the damages resulting from such delay.

Same.—Where the defendant substantially contributes to the failure or inability of a contractor to comply strictly with some contract provision, such provision as well as compliance therewith is waived. *Standard Steel Car Company* v. *United States*, 67 C. Cls. 445; *United States* v. *United Engineering and Contracting Co.*, 47 C. Cls. 489, affirmed 234 U. S. 236.

Same; appeal from favorable decision not required.—The contract in suit did not compel the plaintiff to appeal to the head of the department from a decision or conclusion of the contracting officer not in writing, or from a favorable decision or conclusion, or to appeal to enforce a favorable ruling.

The Reporter's statement of the case:

Mr. H. Cecil Kilpatrick and *Mr. Richard S. Doyle* for the plaintiff. *Messrs. Mills & Kilpatrick*, and *Mr. Fred S. Ball* were on the brief.

Mr. Joseph M. Friedman, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* and *Mr. Henry A. Julicher* were on the brief.

Plaintiff seeks to recover $146,091.60 as damages, representing increased costs and expenses in performance of a contract. Plaintiff alleges these excess costs were not necessary or required by the contract and specifications and were for the most part the result of unreasonable, unauthorized, or arbitrary, capricious and grossly erroneous acts, conduct, and requirements of the defendant's designated and authorized agents and officers which amounted to breaches of the express and implied provisions and conditions of the contract.

The defenses interposed are (1) that if plaintiff suffered delay in the prosecution and completion of the work, the defendant was not the cause of it and is not liable for any increased cost which may have been incurred by reason thereof; (2) that there was no breach of any express or implied provision of the contract and specifications; (3) that the defendant's agents and officers having charge of the work and the enforcement of the provisions of the contract and specifications did not impose any unreasonable requirements and did not in any case in their acts, rulings, or decisions under the contract act unreasonably, arbitrarily, capriciously, or so erroneously as to imply bad faith; (4) that plaintiff has no right to recover because he did not strictly comply in those instances in connection with which claims are made for alleged unnecessary costs and damages, with the literal provision of the second proviso of Article 9 of the contract with reference to protest in writing and the provisions of such proviso and Article 15 as to appeal; and (5) that the evidence does not sufficiently establish the excess costs and damages claimed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a resident of Montgomery, Alabama, is engaged in the general contracting business, having his principal office at Montgomery. Plaintiff's subcontractor, Roanoke Marble & Granite Company, Inc., a Virginia corporation, with its principal office at Roanoke, is engaged in the marble, granite, tile, and terrazzo business.

The invitations for bids, to be opened December 1, 1933, together with detailed specifications, drawings, and standard contract forms, were issued by defendant and delivered to prospective bidders November 9, 1933. These invitations for bids and specifications called for separate bids to be considered in connection with the making of contracts for (1) "General Construction"; (2) "Plumbing, Heating, and Electrical Work"; (3) "Electric Elevators"; (4) "Steel Water Tank and Tower"; and (5) "Refrigerating and Ice-making Plant." The invitation for bids and the specifications upon which plaintiff submitted his bid, and on which he was awarded a contract, were for "General Construction" of the buildings, roads, and other work called for therein. The invitation for bids stated that separate bids would be received and separate contracts made for the several classes of work mentioned, and the General Provisions of the Specifications (section 1G, par. 7) and the Standard Forms of Contracts awarded, including the contract and specifications of plaintiff, provided (section 13), that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor."

Under this and other provisions of the contracts the defendant assumed the obligation and duty of taking such action at the proper time as would prevent any contractor with defendant from unreasonably delaying or interfering with the work and progress of any other of the government contractors. The defendant failed to fulfill and discharge

this obligation and duty under its contract with plaintiff, and by reason of such failure plaintiff was unreasonably delayed and put to extra and unnecessary costs and damages.

The specifications, on all of the five different classifications of work mentioned above and for which bids were asked, were in one document and were delivered to each of the bidders.

2. In the invitations for bids, the printed bid form, and the specifications, the bidders were not permitted to state or propose the period of time within which the work called for by the specifications and drawings, upon the basis of which they were to submit their bids, was to be completed, but the period of time for the completion of the work called for was fixed and stated by the defendant as 420 calendar days after the date of receipt of notice to proceed. The last paragraph of Item I of the printed bid form for General Construction which plaintiff used in making his bid provided as follows: "Performance will begin within ten (10) calendar days after date of receipt of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to proceed, except that Administration and Storehouse buildings will be completed 30 and 60 days, respectively, prior thereto and Radial Brick Chimney and sufficient work in Boiler House Building to permit installation of boilers and equipment will be completed 90 days prior thereto." This identical provision was also written into Article 1 of the contract subsequently executed, as the last paragraph of that Article.

Bidders for the plumbing, heating, and electrical work called for by the specifications were not permitted to state or fix the time within which they would complete the work called for and for which bids were submitted, but the invitations for bids, the printed form of bid, and the specifications fixed the period for completion. The printed bid form on which the bidders for plumbing, heating, and electrical work submitted their bids provided as follows:

> The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for "Gen-

> eral Construction," with the exception that plumbing, heating, and electrical work in connection with Boiler House Building will be required to be completed 30 days in advance of other work and such work in connection with the Administration and Storehouse Buildings shall be completed 30 and 60 days, respectively, prior thereto.

This provision was incorporated in the contract as subsequently made for the plumbing, heating, and electrical work.

3. December 2, 1933, the defendant accepted plaintiff's bid for the general construction work and on that date advised plaintiff in part that "Acceptance is hereby made of Item I together with Alternate (f) under Item I of your proposal dated November 29, 1933, which was submitted in response to advertisement dated November 9, 1933, and opened in this Service December 1, 1933." Item I of plaintiff's bid was $866,780 for the units of work specified therein, and in subdivisions (a) to (k), inclusive, plaintiff stated the amounts by which his total bid above mentioned would be increased or decreased under certain alternates under Item I. Alternate (f), which the defendant originally accepted in its notice to plaintiff on December 2, provided for a decrease of $14,263 in the total amount bid, in respect to building No. 17. The bid as first accepted on December 2 was therefore in the total amount of $852,517. In that acceptance, however, defendant advised the plaintiff that "In making this award the Government reserves the right to accept also any one or more of alternates (a), (b), (c), (d), (e), and (1) under Item I of your proposal at any time within sixty (60) calendar days after December 1, 1933, the date when bids were opened."

Upon the acceptance of plaintiff's bid in the amount of $852,517, as above stated, the defendant prepared the contract dated December 2, 1933, and sent the same to plaintiff for execution and return with performance bond. Plaintiff duly executed the contract and returned the same with performance bond dated December 14, 1933, and the contract was thereupon executed by defendant, represented by L. H. Tripp, Director of Construction of the Veterans' Administration, as contracting officer. Thereafter, on Janu-

ary 30, 1934, the defendant, by its contracting officer, wrote plaintiff a letter, entitled "Change Order 'A' (Increase)—$361,785.00," in part as follows:

> Confirming telegram dated January 30, 1934, and as contemplated by your proposal dated November 29, 1933, Administrative letter of acceptance dated December 2, 1933, and your telegram dated January 26, 1934, acceptance is hereby made of alternates (a), (b), (c), (c–a), and (c–c) under Item I of your proposal.
>
> * * * * *
>
> The contract price, in accordance with your proposal dated November 29, 1933, is hereby increased by the sum of Three Hundred Sixty-One Thousand Seven Hundred Eighty-Five Dollars ($361,785.00).

Shortly thereafter plaintiff's alternate bid (1) under Item I, in the amount of $14,500.00 was reduced to $14,100.00 by agreement of the parties and as so modified was accepted by defendant. The total of plaintiff's main and alternate bid prices as above mentioned, $1,228,402.00, was thereafter adjusted by agreed changes to an aggregate of $1,228,423.68.

4. The contract between the parties upon that portion of plaintiff's bid as originally accepted and the specifications forming a part of the contract required plaintiff to

> * * * furnish all labor and materials, and perform all work required for wrecking existing buildings, etc., and constructing and finishing complete at Veterans' Administration Facility, Roanoke, Virginia, Main Bldg. #2; Dining Hall and Attendants Qtrs. Bldg. #4 and Connecting Corridor #2–4; Colored Patients Bldg. #7; Boiler House Bldg. #13 including Radial Brick Chimney; Laundry Bldg. #14; Storehouse Bldg. #15; Garage and Colored Attendants Qtrs. Bldg. #16: Nurses Qtrs. Bldg. #17, decreased in length as specified in Alternate "f"; Managers Residence Bldg. #18; Officers Duplex Qtrs. Bldg. #19; Sewage Pump House Bldg. #23; Pipe Tunnels and Manholes between Dining Hall and Attendants Qtrs. Bldg. #4 and Laundry Bldg. #14 and Boiler House Bldg. #13 and Laundry Blg. #14; Flag Pole; also roads, walks, grading and drainage in connection with these buildings; but not

> including Plumbing, Heating, Incinerator, Electrical Work, and Outside Distribution Systems; Electric Elevators, Steel Water Tank, and Tower #24 and Refrigerating and Ice Making Plant; for the consideration of Eight Hundred Fifty Two Thousand Five Hundred Seventeen Dollars ($852,517.00) in strict accordance with the specifications, schedules, and drawings, * * * designated as follows: Specifications for Buildings and Utilities for Veterans' Administration Facility at Roanoke, Virginia, November 9, 1933, and the schedules and drawings mentioned therein; two Addenda, No. 1 dated November 20, 1933, and No. 2 (telegram) dated November 28, 1933; as contemplated by Item I and Alternate (f) under Item I of the contractor's proposal dated November 29, 1933, and letter of acceptance dated December 2, 1933.

Under the alternates of the bid subsequently accepted plaintiff was required to furnish all labor and materials and perform all work required for constructing and finishing complete

> * * * one Administration Building No. 1, including connecting corridor No. 1–2 and retaining wall, one Acute Building No. 6, including connecting corridors Nos. 4–6 and 6–7, and one Recreation Building No. 5, including the increased length as shown on drawings and specified and connecting corridor No. 5–6 decreased to the length shown on Drawing No. C–1 or specified, together with the road work, walks, grading and drainage in connection with these buildings, but not including Plumbing, Heating, Electrical Work and Outside Distribution Systems, all to be performed as an addition to your contract VAc–424 dated December 2, 1933, and in strict accordance with the specifications dated November 9, 1933, and the schedules and drawings mentioned therein, together with two Addenda, No. 1 dated November 20, 1933, and No. 2 (telegram) dated November 28, 1933, and to be completed at a date not later than the contract date for completion provided in contract VAc–424, except that the Administration Building No. 1 is to be completed Thirty (30) days prior thereto.

The contracting officer mailed plaintiff notice to proceed on December 19, 1933, which was received by plaintiff December 21, thereby fixing February 14, 1935, as the date

for completion of all the work called for by the contract under the contract period as fixed by defendant.

5. Plaintiff's engineer, J. E. Lacey, arrived at Roanoke December 19, 1933, and on December 21 with two assistants began clearing brush, trees, etc., and surveying for the purpose of locating building lines, and grades for excavations and soon thereafter a temporary field office was built. Plaintiff's first equipment arrived on the job January 15, 1934, and excavation work was commenced January 16. This work was thereafter diligently carried on by plaintiff, and plaintiff at all times had adequate and sufficient equipment and employes for speedily and adequately carrying on the work covered by the contract and for the completion thereof, as called for and required by his contract, by November 1, 1934. Plaintiff made his bid and computed the cost to defendant of the entire construction work called for on the basis of the completion thereof by November 1, 1934. Defendant was so notified soon after work was commenced.

6. Under the invitation for bids and detailed specifications issued November 9, 1933, for all plumbing, heating, and electrical work required or necessary to be installed in the buildings to be constructed by plaintiff, in an orderly manner as plaintiff's construction work proceeded, one C. J. Redmon, trading as Redmon Heating Co., with principal office and place of business at Louisville, Kentucky, submitted a bid of $300,000, which was accepted by defendant December 6, 1933. On that date a contract on the standard form between Redmon Heating Co. and the defendant was prepared by the defendant and sent to Redmon for execution and the furnishing of his performance bond. The contract was duly executed by Redmon and returned to the defendant with the performance bond, and was duly executed by defendant, represented by L. H. Tripp, Director of Construction of the Veterans' Administration, as Contracting Officer. Under this contract Redmon was obligated and required to furnish all labor and materials and perform all work required for the complete installation in and at the buildings covered by plaintiff's contract and to be constructed by him, of all plumbing, heating, and electrical

work, including all outside distribution systems for all buildings, but not including electric elevators, steel water tank and tower, refrigeration and ice plant. The contracts between plaintiff and defendant and between Redmon and defendant contained a provision that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor." Plaintiff at all times throughout the prosecution of the work called for by his contract fully complied with this provision, but C. J. Redmon did not at any time comply with this provision and the defendant delayed unreasonably in taking such action, after repeated protests by plaintiff, as would avoid unreasonable delay to plaintiff.

In accordance with the provision of the printed form of bid on which Redmon submitted his bid, his contract with defendant provided that his work was to be commenced promptly after the date of receipt of notice to proceed and was to be completed at a date not later than that provided in the contract for general construction, with the exception that plumbing, heating, and electrical work in connection with the Boiler House Building was to be completed 30 days in advance of other work and that such work in connection with Administration and Storehouse Buildings was to be completed 30 and 60 days, respectively, prior thereto. The contracting officer mailed to Redmon notice to proceed on or about December 19, 1933, and the same was received by Redmon on or about December 21.

Plaintiff's contract (Exhibit 2) and the specifications under plaintiff's and Redmon's contracts (Exhibit 2a) and Redmon's contract with defendant (Exhibit 13) are in evidence and are made a part hereof by reference.

7. Neither Redmon, the mechanical contractor, nor any representative of his reported at Roanoke, the site of the work, until March 19, 1934, when the superintendent for Redmon Heating Co. arrived at the site of the work after many urgent demands by the contracting officer upon Redmon that he

proceed with the work and after the contracting officer advised Redmon in writing that, if he did not have a representative on the site of the work by March 15, his contract would be terminated. Redmon, the mechanical contractor, did not at any time between the date he was given notice to proceed and June 26, 1934, when his contract was abandoned and terminated, as hereinafter set forth, have adequate equipment or men on the job properly to carry on the work called for and required by his contract, and Redmon was not financially able to carry on and complete the work under his contract at any time between the date of the contract and the date on which it was abandoned by Redmon and thereupon terminated by defendant. The failure of Redmon to commence and prosecute the work called for by his contract with defendant, and which was necessary in order that plaintiff might properly proceed with his work, was due to financial difficulties and to willful neglect. Reasonable inquiry by defendant when plaintiff first began to protest in January 1934 would have disclosed these facts. No such inquiry was made by defendant. The failure of the contracting officer to take any action other than to request Redmon to commence and carry on the work called for by his contract was due to false statements and reports, of which plaintiff had no knowledge, by the defendant's authorized officers and agents in charge of the work at the site thereof.

The second paragraph of the invitation for bids issued November 9, 1933, provided as follows:

> Bids will be considered only from responsible individuals, firms, or corporations. In determining the lowest responsible bidder, consideration will be given as to whether the bidder involved maintains a permanent place of business; has adequate plant equipment to do the work properly and expeditiously; has a suitable financial status to meet obligations incident to the work and has appropriate technical experience.

No inquiry or investigation was made by defendant as to Redmon's plant equipment or financial status before he was given the contract for the plumbing, heating and electrical work necessary to be furnished and installed in connection and cooperation with plaintiff's work.

8. In cases of this kind involving separate and independent contracts for construction and mechanical work, it is the usual and recognized practice for the contractor for the general construction orderly to progress with his work so as to permit the proper installation therein of all necessary mechanical materials and equipment. This the plaintiff at all times did. It is also the usual and recognized practice that the mechanical contractor must orderly and diligently so prosecute his work as to properly place and install all necessary mechanical equipment and materials as called for in the work of the general contractor so as not unreasonably to delay the progress of the work of the general contractor. This the Redmon Heating Co., as the mechanical contractor, at all times prior to the date on which its contract was terminated failed to do.

9. In accordance with the usual practice in such cases the plaintiff shortly after his contract was entered into prepared a progress schedule showing that he planned and intended to finish all the work called for by his contract and the specifications by November 1, 1934, a period of 314 calendar days from the date of receipt of notice to proceed. This progress schedule was prepared by plaintiff January 24, 1934 and after it had been examined, checked in detail and approved by plaintiff's engineers and construction superintendents, blue prints thereof were made and furnished to the defendant and the defendant's mechanical contractor on March 30, 1934. The progress schedule was delivered to defendant's officers and was posted in their field office at the site of the work.

Defendant's officers in charge of the work as the representatives of the contracting officer paid no attention to plaintiff's progress schedule and they did not, during the performance of the contract work, cooperate with or assist plaintiff in any reasonable manner to the end that he might rapidly and properly carry on his work in accordance with his progress schedule and complete the same within the time shown thereon. It was the desire of the government and the intention of the parties to the contract that plaintiff's work be completed as soon as possible after notice to proceed had

been given and the contracting officer so notified plaintiff in the early stage of the work and thereafter. There was no express or implied stipulation or agreement in the contract that defendant would not be responsible or liable to plaintiff in damages for excess costs and expenses occasioned by delay caused by defendant in the completion of the work in less time than the period of 420 days fixed by defendant for the purpose of charging plaintiff *liquidated* damages, at a specified rate of $175 per day in the event plaintiff failed without the excuses mentioned to deliver the completed work within the time so fixed. A copy of plaintiff's progress schedule is in evidence as Exhibit 16 and is made a part hereof by reference.

January 24, 1934, plaintiff wrote the Redmon Heating Co., at Louisville, Kentucky, in part as follows:

> We expect to carry on our entire building program with considerable speed and hope to have all buildings completed by November 1st.
>
> Our superintendent in charge of this work is Mr. C. W. Roberts, and the actual planning of the work is being left largely in his hands. You can address him care Algernon Blair, P. O. Box 551, Salem, Virginia, and I suggest that you keep in touch with him so as to keep informed as to our progress and our plans.

The progress which plaintiff planned to make, and on the basis of which he computed and made his bid, and which he would have made except for the delays caused him by the failure of the mechanical contractor properly and orderly to prosecute his work, and the failure of defendant to take proper action with reference thereto, the actual progress which plaintiff was able to make under the conditions encountered and the actual progress which the mechanical contractor, Redmon, made with his work, are shown by Exhibit 147, which is made a part hereof by reference. As an illustration of the delay caused to plaintiff's progress by the failure of the mechanical contractor properly to proceed with his work, the proof shows that by May 1, 1934, plaintiff would have completed 30 per cent of his work, whereas, by reason of such delays, he was unable to complete that percentage of his work until after July 15, and the mechanical contractor did

not complete as much as 30 per cent of the mechanical work until after the 15th of September 1934.

10. At the time of the contract in suit plaintiff had had 35 years' experience in construction work as a builder. He constructed a number of Federal buildings throughout the country prior to November 1918, and since that time has constructed for the United States many hospital facilities for the Veterans Administration ranging in cost from $400,000 to $2,750,000, as well as other Federal and State P. W. A. construction projects of the character covered by the contract in suit. Based on his experience in the performance of contracts for many similar construction projects in the past, plaintiff reasonably estimated (and thereupon computed his costs upon the basis of which his bid was made to the defendant under the contract in suit) that he could and would finish all of the work called for by the contract and specifications by November 1, 1934.

In plaintiff's experience of 35 years in construction work he has never failed to complete a project within the time estimated by him. In one instance plaintiff was charged liquidated damages for two days which he disputed but did not deem of sufficient importance to contest. Afterwards it was found that this alleged delay was due to an error of defendant in computing the time allowed under certain change orders for extra work.

11. The defendant was anxious that the work called for by plaintiff's contract be completed at the earliest possible date, and accordingly on April 4, 1934, the contracting officer wrote plaintiff as follows:

> The Federal Emergency Administrator of Public Works has requested the Veterans Administration to speed up progress on projects financed from funds allocated by that organization, and has suggested that in order to accomplish this, consideration be given to working a double shift on projects in which such an operation is practicable.
>
> Progress reports covering your contract at Roanoke, Virginia, indicate that while more than three months of the contract time has passed, only 5% of the work has been accomplished, and that approximately 50% of the progress is credited to outside approach work. In order

to complete this project within contract time, it will be necessary to speed up the work materially, and it is requested that you give consideration to working double shift at such time as may be practicable. This matter was discussed with your representative, Mr. Andrews, during his recent visit to this Service, and he stated that arrangements were being made by your office to start double shift on the Roanoke project in the very near future.

It is requested that you advise this Service what action you are taking in this matter, and when you expect to start double shift on the project in question.

Upon receipt of your reply, the matter will be taken up with other contractors on the Roanoke project with a view to having them take necessary steps to expedite their part of the work.

Plaintiff's progress with the work called for by his contract was not at any time delayed by failure of the plaintiff to properly prosecute same with all reasonable dispatch under the conditions encountered by him or by any failure of plaintiff to have adequate employees, laborers, material, and equipment.

12. During the performance of the mass concrete work in the buildings called for by plaintiff's contract, certain small portions of concrete were found to be defective when forms were removed. The amount of such defective concrete was less than might reasonably be expected on a job such as the one covered by plaintiff's contract. The entire amount of defective concrete and the cost of removing and replacing the same are correctly shown on plaintiff's Exhibit 143. The total cost of all materials and labor in properly removing and satisfactorily replacing all defective concrete was $535.83. The removal and replacement of the defective concrete did not operate to delay plaintiff in the completion of the entire work called for by the contract within the time contemplated by plaintiff.

The defendant's officers in charge of the work at the site thereof arbitrarily and falsely stated and reported to the Federal Emergency Public Works Administration in July and August 1934 while plaintiff was engaged in the performance of his work, that plaintiff had placed and had to tear out and rebuild $30,000 worth of defective concrete and

$6,000 worth of defective brickwork. Plaintiff did not place any defective brickwork and did not have to remove any brickwork at any expense because defective. Plaintiff had no knowledge of these charges until June 1935, four months after his contract was completed.

October 5, 1934, the contracting officer wrote plaintiff in part as follows:

> Incidentally and in view of the fact that you are slightly ahead of normal progress based on the original completion date [420 days], I am harboring the pleasant hope that the job may, if anything, finish ahead of time. This indeed would be a source of gratification to all of us in view of the difficulties which have been encountered along the way.

13. The seven items of plaintiff's claim, totaling $146,091.60, are as follows:

1. Damages representing increased costs resulting from delays in performance of mechanical work	$51, 249. 52
2. Damages representing costs due to defendant's arbitrary requirement that plaintiff use outside scaffolding in laying brick	25, 886. 84
3. Damages representing increased costs due to unfair, unreasonable, and arbitrary acts and requirements of defendant's Supervising Superintendent and Inspector	9, 033. 21
4. Damages representing increased wages paid by reason of defendant's erroneous ruling on wage scale of reinforcing steel rodmen	8, 657. 05
5. Damages representing increased wages by reason of defendant's erroneous ruling on wage scale for semiskilled carpenters	26, 354. 19
6. Damages representing increased costs and wages for the use of a subcontractor, Roanoke Marble & Granite Co., Inc., by reason of defendant's ruling as to the wage scale of helpers and semiskilled employes on the work performed by the subcontractor subject to the provisions of plaintiff's contract with defendant	9, 730. 27
7. Damages due to increased costs of sandstone by reason of defendant's requirement that plaintiff use local sandstone	15, 180. 52
	$146, 091. 60

14. *Delays caused by failure of defendant to have mechanical work performed properly.*—Early in his work plaintiff advised the defendant's mechanical contractor and the defendant in writing that he had planned and expected to complete the entire work called for by his contract by November

1, 1934. Beginning in January 1934, the contracting officer's attention was repeatedly called to the fact that Redmon's failure to commence any work or to have any men on the job was seriously delaying the progress of plaintiff with the work called for by his contract. Up until the time Redmon abandoned his contract and the same was terminated on June 26, 1934, the plaintiff protested in writing to the contracting officer the delay being caused the plaintiff's work by the failure of Redmon to proceed with his work and maintain reasonable progress. Many such written protests were made by plaintiff, and he also called this continued delay to the contracting officer's attention by telegram, telephone calls, and personal visits to the office of the contracting officer. The action of the contracting officer upon these protests was to write letters to Redmon from time to time urging him to commence his work and to diligently prosecute the same, and advising him that the progress of the construction work was being delayed because of his failure to properly proceed with the work called for and required by his contract and specifications. These requests of the contracting officer were ignored by Redmon except for a promise to have a representative at the site of the work by March 1, 1934, which was not kept. Redmon had not advised the contracting officer as late as March 12, 1934, of the purchase of any materials or the furnishing of any equipment. He did no work of any kind and had no representatives at the site of the work prior to March 19. The reasonable necessities in the circumstances and known to defendant required the presence of Redmon at the site of the work in January in order properly to coordinate his work with that of plaintiff. Redmon had no men on the job other than his superintendent, and no actual work was done by him until March 28, more than three months after he had received notice to proceed under his contract. On that date Redmon had only four men on his force, including his superintendent. The average number of men which Redmon had on the job during the period between March 28 and June 26, 1934, inclusive, was twelve. He never had more than six or eight men at work at a time. Redmon did not have an adequate force on the job at any time between

the date on which he received notice to proceed and the date on which he abandoned his contract. From June 13, 1934, Redmon was financially unable to meet his pay rolls and to furnish the necessary materials, and this continued until June 26, when he advised the contracting officer that he was unable to proceed with his contract. Redmon's entire force on the work on June 26 consisted of only six men. Beginning June 29, 1934, the Maryland Casualty Company, surety on Redmon's bond, undertook to carry on some of the work called for by Redmon's contract, but made unsatisfactory progress with a force of about 12 men per day. On July 16 the Maryland Casualty Company made a contract with the Virginia Engineering Company to take over Redmon's unfinished work, and this contractor immediately began increasing the working force. By August 1, 1934, the new mechanical contractor had a force of 107 men on the job, and before the end of August it had working on the project more than 200 men.

Redmon did none of the outside work called for by his contract prior to the time it was terminated. Such work was necessary in order that plaintiff might properly proceed with the outside work called for by his contract, and Redmon soon after receiving notice to proceed should, in accordance with usual and customary practice, have had an adequate force and at least two ditching machines, necessary air compressors, picks, shovels, tampers, caulking tools, and a back filler, but he had no such force and none of this equipment on the job at any time. Reasonable cooperation necessary under his contract required that he have a large force of men engaged on this outside work. Orderly and reasonable coordination by Redmon required that many of his outside trenches be dug, his steam, water, drainage and other pipes laid, the trenches refilled and settled before plaintiff could do any substantial part of his outside work. Reasonable cooperation by Redmon with plaintiff required that Redmon begin his outside work in January and complete the same by the latter part of April 1934. Had defendant required Redmon to proceed in a reasonable manner plaintiff could and would have completed all of his outside work, consisting of grading, topsoiling, building and paving roads, curbs, gutters, sidewalks

and parking areas, in early September 1934. As a result of the unreasonable delay in plaintiff's progress caused by failure of defendant to take proper and timely action concerning performance of the mechanical work and the failure of Redmon to do any substantial amount of such necessary work, and, notwithstanding the efforts made by the Virginia Engineering Company to overcome the delay of the defendant and Redmon in properly proceeding with the mechanical work, which the Virginia Engineering Company was unable to do, plaintiff was required to do most of his outside work under winter conditions in November and December 1934, and January and the first half of February 1935, when weather conditions made this work much more expensive.

Plaintiff was delayed and put to increased expense, particularly with reference to the boiler house, by failure of Redmon to furnish the necessary detailed drawings in connection with the boiler house equipment and recessed radiators under windows in various buildings. Redmon was required under his contract to lay numerous pipes for gas, water, steam, electric, and sewer lines outside the buildings and under the basement slabs. Plaintiff could not pour concrete for basement slabs until Redmon had dug these underground trenches, laid his pipes, and filled and tamped the trenches. Orderly procedure under Redmon's contract required that he perform this underground work in each building immediately after plaintiff had finished the general excavation for such building. By June 26, 1934, Redmon had not performed as much as 6 percent of such work, and that condition existed with respect to most of the fifteen buildings covered by the contract. This failure of Redmon unreasonably delayed the orderly progress of plaintiff's work. Plaintiff was also unreasonably delayed by the delay of Redmon in laying and placing pipes, pipe sleeves, etc., and placing conduits, and his failure to perform in a reasonably expeditious manner his roughing-in work, consisting of placing electrical work and steam, water, gas, and sewage pipes inside of walls. It was necessary for the mechanical contractor to perform this work before plaintiff could proceed with the building and finishing of the walls. Redmon did not at any time have an adequate force of workmen or adequate mate-

rials and supplies for the proper prosecution of the work.

Plaintiff's costs were considerably and unnecessarily increased during the performance of work in November and December 1934, and January and February 1935, over what his costs would have been if he had not been delayed by failure of Redmon to properly proceed with his work, and if plaintiff had been permitted to complete the work by November 1. During this period from November 1, 1934, to February 14, 1935, it was necessary for plaintiff to furnish temporary heat in the buildings under construction at a cost of $4,124.73 in excess of the amount which he would otherwise have been required to expend and in excess of the amount which was included therefor in the contract price. In addition plaintiff's reasonable cost of grading and constructing roads and walks was increased because of Redmon's delay by reason of the necessity of heating concrete and asphalt, his inability to pour concrete under freezing conditions, the necessity of keeping concrete finishers at work at night waiting for concrete to set, the necessity of furnishing antifreeze mixtures in machinery, of draining water from machinery and refilling, and because of frozen water lines and machinery. A further reason for this increased cost was the fact that there were many open or uncut trenches for the mechanical equipment which made it necessary for plaintiff to perform his paving work in small sections. The reasonable extra cost and expenses to plaintiff of grading and building roads and walks as a result of delays caused by Redmon's failure properly to proceed with his work, over what such cost and expenses would otherwise have been, were $12,734.91.

After the Virginia Engineering Company took over the mechanical work it made every effort to overcome the delay which Redmon had caused, by greatly increasing the working force, machinery, and equipment, but it was unable to do so. Plaintiff prosecuted his work with due diligence, but was unable to finish it until February 14, 1935. The progress which plaintiff was able to make under the conditions prevailing and the progress by Redmon during the period February 1 to June 30, 1934, as compared with the Government's estimate of normal progress on the basis of the contract period of 420 days as fixed by defendant, were as follows:

Date	Redmon's progress (%)	Plaintiff's progress (%) (420 days)	Government's "normal" (%) (420 days)
1934			
Feb. 1	0	2.0	2.3
Feb. 28		3.4	5.0
Mar. 31	.1	5.0	9.0
Apr. 15	1.1	6.9	12.0
Apr. 30	3.6	9.8	16.0
May 15	4.3	14.9	20.0
May 31	5.4	19.0	25.9
June 15	5.8	23.2	30.9
June 26	6.3		36.0
June 30		27.1	36.0

Except for delay in mechanical work and other delays caused by defendant, plaintiff's progress would have been far ahead of "normal" on the 420 days' basis, and would have been normal on the plaintiff's basis of 314 days (November 1, 1934). Redmon's percent of progress was of no assistance to plaintiff because the mechanical work which Redmon did perform was so far behind plaintiff's work. Redmon never did any work of consequence which was of any value to plaintiff's proper progress.

During the first six months of the contract period Redmon's progress was only about 1 per cent a month. During the next four months, from July to October, inclusive, plaintiff completed 56.9 per cent of his work and the Virginia Engineering Company completed 55.8 per cent of the mechanical work. The Virginia Engineering Company's monthly progress was about 13.9 per cent, which was no more than reasonable under the requirements of the contract that the mechanical contractor keep up with the work of the plaintiff as constructing contractor. But even this progress of the new mechanical contractor did not bring the mechanical work current with plaintiff's work, and plaintiff was never able to overcome the serious delay which had occurred. During the period prior to termination of Redmon's contract plaintiff was unable to perform more than an average of 4.5 per cent of work per month. During the subsequent period when the Virginia Engineering Company was performing the mechanical work, plaintiff was able to perform 10 per cent of the work per month, completing 64.5 per cent of his contract during the last 6½ months of the period.

Plaintiff was not delayed at any time during the contract period by reason of his failure to have on hand at the work a sufficient and adequate force of workmen and all necessary materials, supplies, and equipment. The supervising superintendent of construction, who was the authorized representative of the contracting officer on the job, and his assistant, who acted as Inspector for the defendant, recorded and reported to the contracting officer that plaintiff's progress was being delayed at certain times by reason of the shortage of materials and because of other reasons for which they considered plaintiff responsible other than the delays caused by failure of Redmon properly and diligently to proceed with his work. The contracting officer's authorized representative and his assistant also recorded and reported to the Contracting Office during the period January to June 26, 1934, that the Redmon Heating Co. was not delaying plaintiff's progress, and that plaintiff was delaying the work of the mechanical contractor. The alleged facts so recorded and reported were untrue.

Under the facts, conditions and circumstances which obtained and of which the contracting officer was fully and correctly advised by plaintiff, the defendant delayed unreasonably in taking timely and proper action to prevent delay to plaintiff and in terminating Redmon's contract for his failure properly to proceed with and prosecute his work to the end that such work be kept abreast of that required to be performed by plaintiff.

Plaintiff was unreasonably delayed in the completion of the work called for by his contract for a period of 3½ months, as a result of which he incurred and paid the following increased costs in excess of the costs included in the contract price and in excess of the costs which he would otherwise have incurred except for such delay:

Salaries of supervisory and clerical forces and expenses at Roanoke for 3½ months	$11, 344. 40
Overhead expenses at Montgomery office for 3½ months	18, 093. 52
Liability and compensation insurance	4, 661. 07
Heating cost	4, 124. 73
Field expenses, resulting from delay in furnishing Boiler House information	290. 89
Cost of grading, roads and walks	12, 734. 91
Total	$51, 249. 52

15. *Claim for $25,886.84, representing (1) increased cost of material and labor for outside scaffolds, $10,466.88; (2) extra labor cost for brick masons, $12,990; and (3) loss from unreasonable inspection, $2,429.96.*—The face brick specified for the buildings covered by plaintiff's contract and approved by defendant was so manufactured as to have the appearance of hand-made brick. They varied as much as one-half inch in length and they also varied in width to such an extent as made it impossible to keep the vertical mortar line or joints absolutely uniform in width or to keep such mortar line to within a variance of 1/8 of an inch. The contract called for mortar joints "approximately 1/2 inch thick", and stated that "the joints shall be of practically uniform width throughout". The type of brick was not specified. The kind and type of brick to be used were decided upon after the contract was made. With regard to windows the contract provided only "that the brick and joints on each side of the center line of each opening, etc., shall be similar". The long side of the brick when laid with the wide side face down was called a "stretcher." When the end of the brick was exposed in the wall, this was called a "header." Each horizontal row of brick is known as a "course." The brick arrangement specified for the buildings covered by plaintiff's contract, known as Flemish Bond, consisted of alternate headers and stretchers in each course, with the header in one course centering over the stretcher in the next course below.

The brickwork under plaintiff's contract is covered by specifications 5C, pages 1 and 2. Paragraph 4 of these specifications, so far as material here, is as follows:

> Brickwork shall be built plumb and to a line. Bricks shall be laid in a full bed of cement mortar with shoved joints and with each course completely flushed with mortar. All vertical and horizontal joints shall be completely filled with mortar and all brick facing heavily pargeted on the back side with cement lime mortar wherever cinder blocks are to be used for backing up of exterior walls and the dampproofing and plaster finish omitted from the face of the walls on the room side. The outside face of all brickwork used in connection with cinder backup blocks with dampproofing and plaster omitted from the inside face of the wall

shall be given two heavy coats of an approved colorless dampproofing as elsewhere specified. Facing brick for the Administration Building, Main Building, Dining Hall, and Attendants' Quarters Building, Recreation Building, Acute Building, Colored Patients' Building, Connecting Corridors, Nurses' Quarters, Manager's Residence, and Officers' Duplex Quarters shall be laid in Flemish Bond with "Homewood" joints made by running a tool along the joints against a straight edge to form a fine indented line in the center of the mortar joint. *Joints shall be approximately ½-inch thick*, except that brick arches shall have joints approximately $^{3}/_{16}$-inch thick. Facing brick for all other buildings shall be in common bond laid with weathered *joints approximately ½-inch thick*, except as otherwise indicated, and with header course giving through bond at every sixth course. Mortar for facing brick shall have added to it a pure mineral pigment to produce an approved light tan or buff color which will harmonize with the color of the brickwork.

Through bonding shall be provided in typical walls as shown by detail. Where through bonding is not possible, the brick shall be bonded to the masonry walls, columns, etc., by approved metal ties. The bond of all facing brick shall be maintained plumb and *the joints shall be of practically uniform width throughout*. Exterior brickwork shall be laid out with uniformity regarding openings and breaks in walls so that the *brick and joints on each side of the center line of each opening, etc., shall be similar*. (Italics supplied.)

Under such specifications and in brick construction work of the kind involved in this case, especially where the bricks vary in length and width, it is reasonable, usual and customary in the construction industry to permit and allow a variance or tolerance of from ⅛ to ¼ inch or a maximum of ¼ inch where necessary. A variation of slightly more than ⅛ inch in some instances, and in others a variation or tolerance of almost ¼ inch was absolutely necessary in this case in order to keep the mortar joints throughout "of *practically* uniform width" and the brick and mortar joints on each side of the center line of each opening *similar*. A tolerance between ⅛ and ¼ inch insisted upon by plaintiff was clearly within the specification terms "*approximately* ½ inch thick", "*practically* uniform", and "*similar*". The requirements and exactions of defendant's authorized officers and

agents of a maximum of 1/8 inch or less variance as to all mortar joints and a maximum of 1/16 inch variance at the center and on each side of the center line of windows or openings were unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith.

In estimating the cost of the brickwork called for by the specifications for the buildings to be constructed, and in preparing his bid therefor, plaintiff planned to lay the brick by the over-hand method, which is a recognized and accepted method of doing such work, especially on buildings of the type and size here involved, under which method the brick masons work from the inside of the building except where outside bracket-scaffolds, or cantilever scaffolds, are needed and used at each floor to lay the brick against the outside face of concrete spandrel beams. This was the customary and acceptable way of laying such brick in the construction of buildings such as those covered by plaintiff's contract. Plaintiff had previously employed this method on similar government buildings without objection and with full approval and such over-hand method of laying brick was employed by plaintiff in the construction of a large hospital facility for the Veterans' Administration which had been completed without objection shortly prior to the beginning of work on the Roanoke facility under the present contract. The contracting officer and his authorized representative, the supervising superintendent of construction on the prior hospital facility buildings were the same persons who were the contracting officer and supervising superintendent of construction under plaintiff's contract for the construction of the Veterans' Administration hospital facility at Roanoke. Under plaintiff's prior contract the supervising superintendent of construction approved the method of laying bricks from inside of the building. When plaintiff commenced the brickwork under the contract in suit the supervising superintendent of construction and his assistant orally directed and ordered plaintiff to build outside scaffolds for all buildings, and required the brick masons to work from the outside of the buildings in laying the brick. Plaintiff protested being required to do this to the supervising superintendent of construction and to the contracting officer insisting

that his contract did not require him to employ that method and incur that expense, and asked for a written order therefor which was refused. In reply to this protest, the supervising superintendent of construction replied that, while he could not order or require the plaintiff to construct such outside scaffolds around the buildings, he could and would make plaintiff sorry if he did not do so or make him wish he had. There was no provision in the contract or specifications which required plaintiff to construct outside scaffolds and lay the brick entirely from the outside of the buildings.

Plaintiff proceeded for the time being to allow his brick masons to lay the brick from the inside. By so doing the brick masons could keep the brick and mortar joints more uniform and similar than could be done by laying the brick from outside scaffords. Thereupon, and solely for the purpose of forcing plaintiff to construct outside scaffolds around all buildings, the defendant's supervising superintendent of construction, as the authorized representative of the contracting officer, and his assistant, who was the superintendent of construction and inspector, required of plaintiff that a header brick must come exactly and precisely under the center line of each window or opening; that such brickwork under and around all other windows in that wall and all windows on opposite sides of all buildings and in opposite wings of each building must be precisely uniform to a maximum of 1/16 of an inch by measurement. A variance of more than 1/16 inch could not be detected without measurement. In addition, and for the same reason, the defendant's supervising superintendent of construction required and exacted of plaintiff mortar joints throughout the buildings that did not vary more than 1/8 inch by measurement. Brickwork not meeting these exact requirements was rejected. Plaintiff was told that he could not lay brickwork that would be acceptable unless he used outside scaffolds. These exactions and requirements were unauthorized, arbitrary, capricious and so grossly erroneous as to imply bad faith.

Thereupon the plaintiff being confronted with a situation and with requirements which it was impossible to meet and overcome, proceeded to purchase the lumber and other material necessary for, and to build, necessary outside scaffolds

around the buildings and performed all of the brickwork from such outside scaffolds. When this scaffold controversy was going on plaintiff was being delayed by reason of no mechanical work being done. The construction and use of outside scaffolds seriously delayed plaintiff's progress and made the brickwork much more expensive than it otherwise would have been. All brickwork could have been performed better, more nearly in accordance with the specifications and at much less expenses by the customary and accepted overhand or inside method which plaintiff in making his bid planned to use.

As soon as plaintiff began constructing and using outside scaffolds, the defendant no longer exacted the precise requirements as to exact accuracy in centering header brick in windows and in the mortar joints but permitted without further objection the usual and customary variance or tolerance.

As a result of the aforementioned unreasonable requirements, plaintiff's costs of performance were increased $25,-886.84, which is made up of $10,466.88, actual cost of material and labor for scaffolds; $12,990, extra labor costs for brick masons, and $2,429.96, actual loss from increased wages due to delays by reason of the unreasonable inspection requirements as to laying brick prior to the construction of the outside scaffolds.

16. *Claim for $9,033.21 extra expenses* due to arbitrary and unauthorized rulings by the supervising superintendent of construction and his assistant, is made up of (a) $4,952.95 actual salaries and expenses of two extra representatives which under the circumstances it was necessary for plaintiff to station at Roanoke solely to handle protests, etc., with the defendant's officers in charge of the work and directly with the contracting officer in Washington; (b) $2,620.66 actual cost of unnecessarily bolting metal concrete form pans with three bolts at the overlap; (c) $1,352.10 actual cost of performing certain fine grading work in the basements of certain buildings a second time, and (d) $107.50 actual extra cost of temperature steel improperly required by supervising superintendent of construction where two-way reinforcing steel was used.

(a) The proof shows that in a great many instances of inspection and instruction during performance of work under plaintiff's contract, defendant's supervising superintendent of construction and his assistant superintendent-inspector were unreasonably meticulous and over-exacting and positively showed a lack of reasonable and proper cooperation as a whole throughout the performance of the contract. Plaintiff and his officers and employees at all times acted reasonably and properly and were not guilty of any acts or conduct that justified the unreasonable acts and conduct of defendant's officers. The circumstances and conditions encountered by plaintiff throughout the performance of his contract by reason of the acts and conduct of defendant's officers in charge of the work were other than he had any cause to expect on a job of the type and character covered by his contract.

Immediately after plaintiff began work under the contract defendant's officers in charge of the work at the site thereof began, without any justification, to act in an unreasonable, arbitrary, unauthorized and unfair way toward plaintiff, and continued so to act throughout the performance of the contract. They constantly and without plaintiff's knowledge made false, misleading and unfair reports to their superiors concerning plaintiff and his work. On numerous occasions they required plaintiff to do things admittedly not required of him under the contract on threat of reprisals for refusal. On occasions defendant's agents would capriciously and without reason reverse their instructions and directions after plaintiff had proceeded to comply with the first instructions. In the course of their work defendant's agents in immediate charge of the work unreasonably and unnecessarily engaged in harsh, profane and abusive language to plaintiff's officers and employees thereby unreasonably interfering with and disorganizing the work. Defendant's officers at the site of the work resented being reversed by the contracting officer's office in their instructions and orders and refused when requested to give plaintiff written orders; they resented plaintiff's making protest to the contracting officer, thereby rendering it impossible for plaintiff effectively to protest in writing in each instance to the contracting officer

through the defendant's officer at the site of the work. Plaintiff never failed with respect to any of the claims here involved to timely and fully protest to the supervising superintendent of construction and personally to the contracting officer. The contracting officer was fully advised by plaintiff of the reasons and necessity of oral protests and conferences on and with respect to the acts, conduct, rulings and requirements of the defendant's officers at the site of the work. With full knowledge and understanding of the circumstances and conditions, the contracting officer acquiesced in the procedure followed by plaintiff, and at no time requested or directed plaintiff to submit his protests in writing.

The contracting officer never failed to consider plaintiff's protests but as to many of them made no definite decision thereon by reason of the circumstances which gave rise thereto. The contracting officer in those cases involving unreasonable and arbitrary acts and instructions of the officers at the site of the work stated to plaintiff that he understood and appreciated the troubles and difficulties under which plaintiff was having to perform the work but there was practically nothing he could do about it and that plaintiff should keep him informed but that plaintiff "would just have to do the best he could to get along" with the officers and inspectors at the site of the work, to the end that the work be completed as soon as possible. Cordial relations did not exist between defendant's officers at the site of the work and the contracting officer's office.

As a result and by reason of the unreasonable attitude and acts of defendant's officers at the site of the work it was impossible for plaintiff's superintendent of construction to handle the matter of protests and appeals to the contracting officer and it was necessary and plaintiff did incur and pay $4,952.95 for salaries and expenses, including travel expense of two extra representatives at Roanoke to handle protests to and hold conferences with the defendant's officers and the contracting officer. This expense was in excess of the costs included in the contract price and in excess of the costs which plaintiff would have incurred except for the unreasonable, unauthorized and arbitrary acts of defendant's officers.

Instead of having an inspector constantly available to

inspect plaintiff's work as it progressed and although requiring that each step in the work be inspected before the next step was taken by plaintiff the defendant's agents in immediate charge of the work required of plaintiff that he give them at least two hours written notice before they or either of them would make inspections. This had the effect of unnecessarily delayed the progress of the work and rendered it more expensive than it would otherwise have been. Defendant had only one inspector on the entire construction portion of the work and he spent most of his time in defendant's field office. The proof as a whole requires the finding that defendant's officers at the site of the work realized and knew that plaintiff was being seriously delayed by failure of defendant to have the necessary mechanical work performed so that plaintiff could proceed without unreasonable interruption, and for that reason in part entered upon a course of conduct intended to make it appear that plaintiff was not ready for the mechanical work installations and that plaintiff himself was delaying the work. Notwithstanding this the plaintiff had the roof on some of the buildings before the mechanical contractor's contract was terminated and such work gotten under way.

(b) Metal pans about three feet long and twenty inches wide, were required to be and were used for concrete forms, supported by wood forms, for laying concrete floor slabs. All floors were of concrete beam slab construction. There were 241,896 square feet of metal concrete form pans. During the period prior to the date on which the mechanical contractor abandoned his contract and the termination thereof, defendant's superintendent of construction ordered and required plaintiff to bolt these pans together where the ends overlapped with three bolts at each overlap. Plaintiff timely and properly protested this action but nothing was done about it for the reason hereinbefore stated. The pans overlapped from 2½ to 6 inches. The bolting of the pans was not required by the contract, was unnecessary and was contrary to the usual and customary practice in the construction industry. The metal pans were in good condition. They had been put in good condition by the manufacturer before they were used on this job. They did not at

any time allow any unusual leakage of cement. A slight leakage of water in the concrete unavoidably occurs as the concrete is first being poured onto the forms and before the weight thereof seals the overlaps as it always does and did in this instance. The metal pans were not out of shape, bent or warped. The requirement that the pans be bolted was unreasonable, arbitrary and so grossly erroneous as to imply bad faith. After the mechanical contract had been cancelled and relet and after the mechanical work got under way by the new mechanical contractor so that the necessary mechanical work in connection with the concrete floor slabs was being performed, the defendant's superintendent of construction no longer required plaintiff to bolt the metal form pans, although the same pans were thereafter used and were, if anything, not in as good condition as before, but they did not allow undue leakage at any time.

The actual increased and extra cost for labor and material by reason of the bolting requirement was $2,320.66.

(c) Plaintiff's contract required that he perform the work of fine or finished grading in the basement of certain buildings preparatory to laying the concrete basement floor slabs. Plaintiff could not lay these basement floor slabs until the mechanical contractor had dug his trenches in the basements, laid his necessary pipes and backfilled and tamped the soil over such pipes. In such cases it is the reasonable and customary practice for the constructing contractor to wait until the mechanical contractor has performed his work of laying pipes and backfilling and tamping before doing the fine or finished grading preparatory to laying the concrete basement slabs. The defendant's superintendent of construction directed and required plaintiff to do the fine or finished grading work before the mechanical contractor had performed the work of laying pipes under the basements required under his contract. Plaintiff duly protested and did this work as directed and, after the mechanical contractor had dug his trenches, laid his pipes and made his backfills over them, plaintiff was required to do certain of his final finished grading work in certain basements a second time at an increased cost of $1,352.10 over what such grading would have cost if he had been permitted to wait until after the

mechanical contractor had finished the work required of him, as above mentioned.

This requirement was arbitrary, unreasonable and so grossly erroneous as to imply bad faith.

(d) April 19, 1934 defendant's superintendent of construction directed and required plaintiff to place temperature reinforcing steel or nonshrinkage steel rods in the two-way reinforced concrete slabs of the first floor of building fifteen. He took the position that temperature steel reinforcing rods must be used in all solid slabs without distinction as to whether the slabs were reinforced with one-way or two-way rods. Plaintiff protested and made claim for $107.50 for the actual extra cost of the temperature steel furnished and placed as directed. The contracting officer reversed the superintendent of construction but plaintiff was not paid the extra cost of $107.50.

17. *Claim for $8,657.05 excess and extra costs resulting from defendant's ruling on classification of and wage scale for reinforcing rodmen.*—The amount of $4,365.12 of this claim represents the difference of 50 cents an hour between the minimum of $1.10 per hour which defendant required plaintiff to pay all semi-skilled employees who engaged in work of placing or tying reinforcing rods, and the minimum of 60 cents per hour customarily paid in the construction industry for such work which was recognized and classified in the industry and by labor unions as semi-skilled labor calling for an intermediate wage rate between the minimum wage rates for skilled and unskilled labor. The balance of this claim of $4,291.93 represents the actual excess costs and expenses resulting from delay and direct and improper interference with the reinforcing steel work by defendant's supervisory officers and agents.

Plaintiff's contract work was financed and paid for from Public Works Administration funds. Plaintiff's contract was Form No. 51 prescribed by the Federal Emergency Administration of Public Works.

Article 18 of the contract reads as follows:

> ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide,

for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor, $1.10.

Unskilled labor, $0.45.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided*, That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works, acting on such recommendation, establishes different minimum-wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic

conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

Plaintiff, while preparing his bid, wrote a letter on September 4, 1933, to the Secretary of the Interior, addressing his letter to the Federal Emergency Administration of Public Works, as follows:

> A copy of Release No. 56 of the Federal Emergency Administration of Public Works has just come to our attention, this having reference to rates of wage for construction work financed from funds appropriated by the Administrator of Public Works under the authority of the National Industrial Recovery Act.
>
> It seems to us that the wording of this Release is such as to necessitate a number of explanatory interpretations, and I beg of you to issue such interpretations as quickly as possible in order that we may know how to estimate work coming under this head.
>
> In Paragraph I of the Release, minimum wages are stated for "Skilled Labor" and "Unskilled Labor." Is there no intermediate ground between these two classifications? And should not other scales be set for such intermediate classes? What constitutes a skilled laborer? Does not this fixing of the scales for the two extremes only leave open a vast field for controversy which will in some cases work an undue hardship on labor itself and in other cases work an undue hardship on employers?
>
> In this connection, Paragraph IV seems to be particularly in need of some explanation. It is stated that assistants, helpers, apprentices, and serving laborers, who work with and serve skilled journeymen are not to be termed as "unskilled laborers." The wage promulgated is for two classifications only. If a man does not come in the "unskilled laborer" class, then does he necessarily come in the "skilled laborer" class? Does this mean that the laborer who carries lumber to a carpenter and otherwise waits on the carpenter is to receive the same pay as the carpenter? Does the man who wheels a barrow of brick to the brickmasons become more than twice as valuable as the man who wheels cement or sand or gravel to the concrete mixer simply because in doing so he is serving a skilled workman? If under this heading he does not become entitled to the pay of a "skilled laborer," then what pay should he receive?
>
> Under the "prevailing wage scale" law the Government declined to predetermine the wage scale, leaving

> the contractor to investigate in each locality and decide for himself what constituted the "prevailing scale" in that community. Immediately after the award of a contract a dispute would be declared to exist and the Department of Labor would determine and fix the wage scale which might vary so tremendously from the scale which had been found by the contractor as to cause said contractor a tremendous financial loss on the contract and, in fact, in many cases to cause the contractor to become a bankrupt.
>
> We have been hoping and praying for a predetermination of the wage scale but we do feel that this should be a more complete and specific determination, including all classifications, and so clearly worded or interpreted as to leave no room for controversies as to its meaning.

September 11, 1933, the Administrator by the Deputy Administrator, Federal Emergency Administration of Public Works, wrote plaintiff as follows:

> This will acknowledge your letter of September 4, addressed to Hon. Harold L. Ickes, raising certain questions in connection with Public Works Administration Release No. 56.
>
> It is anticipated that there will be certain semiskilled workers who will receive wages less than the rate for skilled workers mentioned. For example, carpenters' helpers would be in such an intermediate grade. The Public Works Administration has not predetermined the wage rate for such intermediate grades. The wage rate set for skilled workers takes into consideration the very restricted working week of 30 hours provided by law.
>
> In setting the wage rate for any intermediate grades this same factor should be taken into consideration. It is, of course, provided that carpenters' helpers, etc., should not be classed as common labor.

October 11, 1933, the Deputy Administrator of the Federal Emergency Administration of Public Works wrote a letter to "All State Engineers and Members of State Advisory Boards," suggesting, among other things, a joint conference of representatives of contractors, labor, and borrowers of public funds. This letter was as follows:

> The question of wage rates for intermediate grades of workers has presented difficulties.
>
> Quite a few of our State Engineers have endeavored to assist contractors and labor to come to an agreement

among themselves on these rates. It is my desire that as much weight as possible be given local customs and usages in this connection, keeping in mind the minimum rates indicated by our regulations for the skilled and unskilled grades, and the 30-hour week.

Several of our State Engineers and State Advisory Boards have approached the problem in what seems to me the proper manner. For example, in North Dakota a meeting of some ten or more representatives of the contractors' associations and some twenty-five representatives of organized labor in the State was called by the Advisory Board and the State Engineer. At this meeting committees of labor representatives and contractors worked out mutually acceptable wage rates for intermediate grades of workers in each of the trades. A few specific cases on which agreement was not reached were referred to the State Advisory Board, acting as arbitrator. Finally a complete scale of minimum intermediate wages was drawn up which had the approval of the entire meeting. This was published in the form of a statement on the joint responsibility of the contracting and labor organizations. I would suggest the addition to the meeting of a few representatives of actual or potential borrowers such as city or State engineering officials and other prominent borrowers concerned with the award of contracts.

The resulting schedule of minimum wages should not be published as on the authority of the State Engineer, but by authority of the representative groups themselves. It is a schedule of wage rates to meet the minimum conditions of the PWA regulations. The clause providing that where collective agreements provide higher wages such higher wages shall prevail should be inserted. The question of the exact territory in which collective bargaining agreements are to be considered in force is another matter. This, the Department of Labor decides.

Such a schedule cannot be considered absolutely binding. In case of a protest by labor on a contract being done under this agreement the matter will be referred to the Board of Labor Review. I have no doubt, however, that when such a schedule is agreed upon by truly representative groups, it will be given great weight by the Board of Labor Review in considering any protests.

Such arrangements will go far to stabilize the labor situation, and I want to encourage all State Engineers and Advisory Boards to encourage responsible local groups to agree upon intermediate wage rates.

The Virginia Public Works Advisory Board requested the Governor of Virginia to call a State labor conference, which he did, the conference being held in Richmond, October 27, 1933. It met for the purpose of agreeing upon a schedule of wage rates for intermediate laborers. The Governor appointed a committee composed of representatives of contractors, labor, and borrowers of public funds. They agreed on a schedule of wage rates for intermediate labor, and the schedule so agreed upon is in evidence as Exhibit 91–B and is made a part hereof by reference. When plaintiff was awarded the contract in suit he was furnished, upon request, a copy of that schedule of intermediate wage rates and the schedule so furnished is in evidence as Exhibit 91 and is made a part hereof by reference. The schedule set forth the following hourly wage rates, among others:

> (1) *Skilled Mechanics at rate of $1.10 per hour:*
>
> * * * * *
>
> Carpenters—interior work, hanging doors, setting windows, trim mill, flooring, and framing work. * * *
>
> (2) *Carpenters on Rough Work at rate of 80¢ per hour.*
>
> (3) *Apprentices, Helpers, or certain Unskilled Laborers at 60¢ per hour.*

No specific provision other than as noted above was made in the schedule with reference to wage rates for laborers or employees performing work usually and customarily recognized and classified by the construction industry and labor as semi-skilled, such as placing ordinary reinforcing steel rods, terrazzo grinding machine operators, etc., under the supervision of competent and experienced men. No specific provision was made in the schedule as to the wage rate for semi-skilled reinforcing rodmen, other than as covered by item (3) above at a minimum of 60 cents per hour.

Plaintiff's contract, P. W. A. Bulletin 51, the Virginia Conference Schedule and P. W. A. Release 56, contemplated and recognized the classification and use by plaintiff of labor on various classes of work which had been and were then usually and customarily regarded and classified as semi-skilled by the construction industry and labor and that for such classified labor he would pay a reasonable

minimum hourly rate of wage between the minimum fixed in the contract for skilled labor and the minimum so fixed for unskilled or common labor. Prior to and during the performance of plaintiff's contract and subsequently the construction industry and labor as well as the government under other P. W. A. 51 contracts recognized, treated and classified the work of placing and tying reinforcing rods as semi-skilled work permitting and calling for the payment of the prevailing intermediate rate of wage, and permitting the use of semi-skilled workers on such work. On March 9, 1935, twenty-three days after plaintiff's contract had been completed the Federal Emergency Administration of Public Works under P. W. A. contracts classified "Reinforcing Steel Work" as "semi-skilled" labor, calling for the payment of an "Intermediate Grade-Minimum" hourly wage rate of 60 cents per hour. This was in accordance with custom and practice of industry and labor and strictly in accordance with plaintiff's course of action and insistence during the performance of his contract.

Plaintiff computed his bid price on the basis that reinforcing steel work would be classified as semi-skilled labor at a minimum wage rate of 60 cents per hour and he paid that minimum at all times until he was compelled and required to pay $1.10 per hour retroactively as hereinafter set forth. Plaintiff did not at any time violate the wage or hours provisions of his contract with defendant.

Before plaintiff commenced work under his contract he prepared, posted and submitted to defendant his schedule of classifications of work and hourly wage scale in each classification. This schedule, among other classifications, classified reinforcing steel work as semi-skilled at an intermediate wage rate of 60 cents per hour. At that time defendant's supervising superintendent of construction as the authorized representative of the contracting officer approved the schedule and plaintiff began operating thereunder, and continued to do so without objection from any source until some time in March 1934. The only tools used by men working on placing reinforcing steel rods are wire pliers and sometimes steel cutters. These men worked under the direct supervision and instructions of experienced and capa-

ble foremen, who had had many years of experience in reinforcing steel work.

Article 19 (b) of plaintiff's contract provided as follows:

> To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: * * *.

The plaintiff fully complied with this provision. The government employment office at Roanoke from which plaintiff obtained his labor was not able to supply plaintiff with a sufficient number of men who were experienced in placing reinforcing steel rods. Plaintiff took this matter up with defendant's supervising superintendent of construction in the early stage of the work and by agreement with defendant's supervising superintendent the plaintiff began using the more intelligent and experienced laborers supplied for this work in laying and reinforcing steel rods under the direct supervision and instruction of other experienced workmen and foremen of long experience. Plaintiff with the consent and approval of defendant paid these semi-skilled men an intermediate wage rate of 60 cents per hour. These men were properly instructed and their work was at all times properly supervised. The reinforcing steel work which they did was properly and correctly performed at all times. About March 10, 1934, defendant's supervising superintendent took the position that reinforcing steel work was "skilled labor" on the sole ground that the contract recognized and provided for only two classifications of labor, namely, "skilled labor" and "unskilled labor" or common labor. Accordingly he told plaintiff that all of this type of work constituted skilled labor for which plaintiff must pay all employees having anything to do with bending, cutting, placing, or tying reinforcing steel rods the skilled labor rate of $1.10 per hour under Article 18 of the contract. No objection was made that the men engaged on the work were not properly performing it, but that plaintiff would have to obtain and use thereon skilled and experienced reinforcing rodmen. Plaintiff properly protested to the defendant's superintendent of con-

struction and to the contracting officer direct. Plaintiff's protest fully stated to defendant that, while he was willing to use only men who were experienced as reinforcing rodmen if defendant insisted and if defendant through its employment office could supply them, reinforcing steel work did not come within the "skilled labor" classification but came within the "semi-skilled" classification at an intermediate wage rate as contemplated and recognized by the contract, and as had been, and was then recognized by the construction industry and labor. Plaintiff did not at any time have any issue or controversy with his laborers or with any labor union. The controversy raised by defendant's superintendent involved only an interpretation of the contract and did not have in it any issue or controversy with labor.

March 15, 1934, defendant's superintendent of construction wrote a letter addressed to the "U. S. Department of Labor, Washington, D. C." as follows:

> Your interpretation is requested as to whether concrete reinforcing steel rodmen, who fabricate and place reinforcing steel in forms, are considered skilled workmen.
>
> As this project is financed by P. W. A. funds, and *there being only two scales, skilled and unskilled labor, this office is unable to determine in which class the reinforcing steel rodmen should be placed.* (Italics supplied.)
>
> Your interpretation is requested at the earliest possible date as this class of work is now being started on this project.

March 20, 1934, the superintendent of construction also wrote the contracting officer as follows:

> It is requested that you contact the Department of Labor and have one of their representatives report to this station for the purpose of making a survey of the scale of wages paid by the contractor and various subcontractors for executing work on the Veterans Administration Facilities, at Roanoke, Virginia.
>
> There is a constant argument between this office and the contractor as to the interpretation of the scale of wages paid unskilled and semiskilled employes.
>
> Your immediate action will be appreciated.

Plaintiff was paying the prevailing intermediate wage rate for reinforcing steel work. That was not the issue

raised by defendant and the Department of Labor had no jurisdiction of the question.

The contracting officer made no independent decision on the question raised by the supervising superintendent. Plaintiff was not furnished with copies of the above quoted letters of March 15 and 20. The defendant's supervising superintendent erroneously and incorrectly stated the question which was in controversy in his letters of March 15 and 20. In his submissions he decided the whole controversy and asked for a ruling on something that was not in issue. There was no controversy about the fact that *if* ordinary reinforcing steel work *was* a "skilled labor" classification reinforcing steel workers would come within it. The actual controversy was "does the contract contemplate and recognize the customary and recognized semi-skilled or intermediate grade of labor at a minimum hourly rate of wage between the minimum of $1.10 per hour specified for 'skilled labor' and the minimum of 45 cents per hour for unskilled or common labor". The defendant's supervising superintendent recognized and admitted that in contracts between individuals and on state projects other than government contracts it was the usual, customary and recognized practice of labor and industry to classify, use and pay for reinforcing steel work as semi-skilled labor at an intermediate rate of wage. The sole basis of his ruling and order to plaintiff was that this contract contemplated, recognized and provided for, only two labor classifications and that *all* labor which did not clearly fall into the unskilled or common labor classification must be classified and paid as skilled labor at $1.10 per hour.

The Department of Labor did not rule on the question as stated by defendant's supervising superintendent.

March 20, 1934, C. D. Hollenbeck, Administrative Assistant for the Veterans Placement Service in the Department of Labor at Washington wrote defendant's superintendent of construction at Roanoke in reply to his letter of March 15 above quoted, as follows:

> In compliance with your request dated March fifteenth as to interpretation of concrete reinforcing steel rodmen, the following is the determination of the Public Works Administration:

"That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.

"The carrying of steel material to the rodmen can and is usually done by unskilled labor."

I trust that this information will be satisfactory.

Defendant did not know, and the record does not show, who, in the Public Works Administration, furnished Hollenbeck with the information which he transmitted to defendant's superintendent. Neither the Department of Labor nor the Public Works Administration ever made a ruling or decision on the real controversy. The statement furnished defendant's officers and by them read to plaintiff was correct on the basis of the erroneous submission but was arbitrary and grossly erroneous if applied to the real and true controversy. After the receipt by defendant of Hollenbeck's letter of March 20, plaintiff had a conference and hearing before the contracting officer and solely on the basis of Hollenbeck's letter he refused to reverse the orders and instructions of the supervising superintendent. The contracting officer made no written ruling or independent decision on the question. The action of the contracting officer in upholding the instruction of the supervising superintendent to plaintiff requiring plaintiff to classify and pay reinforcing steel workers as skilled labor at a minimum of $1.10 per hour was unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

March 22, 1934, defendant's supervising superintendent wrote plaintiff as follows:

Wish to advise that the U. S. Department of Labor, United States Employment Service, has notified this office as follows:

"That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.

"The carrying of steel material to the rodmen can and is usually done by unskilled labor."

It is requested that you take immediate steps in this connection.

On the same day the superintendent of construction further wrote plaintiff as follows:

> Further reference is made to the writer's letter of March 22, 1934, in connection with using classified steel rodmen on reinforcing work at Veterans' Administration Hospital at Roanoke, Virginia.
>
> In this connection it is evident that you have not complied with your contract Form P. W. A. 51, Article 18. Therefore it will be necessary for you to pay these skilled laborers, as interpreted by the Department of Labor, their back salaries for all time these men were doing classified work.
>
> This matter will be checked from your pay rolls.

In reply plaintiff wrote the superintendent of construction March 24, 1934, as follows:

> Reference to my contract for construction of Veterans' Facility at Roanoke, Virginia, and particularly your letters of March 22, 1934, advising me that you have been notified by the U. S. Department of Labor that men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen.
>
> Your second letter of March 22d advises that it will be necessary for me to pay the men whom I have tying reinforcing steel mats the rate for skilled labor and to make this payment retroactive.
>
> The men I had were not experienced reinforcing rodmen and were not sufficiently adapted to this kind of work to warrant my continuing their services as reinforcing steel rodmen.
>
> The Virginia State Employment Bureau, through whom workmen have been furnished me in accordance with Article 19, Section B, of the contract, were requested verbally when the tying of reinforcing steel was started on this operation to furnish me with men experienced in this line of work. This they admitted they could not do and stated so far as they knew there were none available in this vicinity, and it was agreed to use men who would properly come under the classification as set forth in Section D of Article 18 of the contract to do this work.
>
> Since it has been ruled that I will have to pay the skilled-labor rate for this class of work, I want to go on record by stating that I have requested the Virginia State Employment Bureau to furnish me on Monday

morning, March 26th, with at least four men who are experienced in tying reinforcing steel, and additional reinforce [reinforcing] rodmen as needed, and if they cannot do this, I will be compelled to seek these men from other sections.

In your letter of March 23rd, relative to this matter, you list certain men and give the number of hours which their time is to be adjusted.

Under this list you showed Neil Clark as being paid 213 hours at 50¢. During the time Neil Clark was engaged in these number of hours he was used as a rodman with the engineering crew, and while he is shown as a rodman on the certified pay rolls, he did not have anything to do with the reinforcing steel while engaged in these 213 hours. Incidentally, he was the most adept man for this work that I had, although prior to tying steel on this job he had had no experience.

In your letter you also list John Collins four hours at 45¢ per hour. This is evidently the time shown on pay roll for week ending February 22, and while Collins's name appears immediately under the Rodmen, he is a laborer and you will note that his classification was omitted from this pay roll. If you will refer to pay rolls other than the one for week ending February 22d, you will find Collins listed as a laborer.

The statements made in plaintiff's letter were true and correct.

In reply to this letter the superintendent of construction wrote plaintiff on March 26, 1934, as follows:

Reference is made to your letter under date of March 24, 1934, in connection with labor employed on this project as classified steel rodmen (reinforcing), who place, fix, tie, or fabricate steel rods in forms.

You state in the above-mentioned letter that it was agreed upon between you and the local Employment Service that you would use men who would come under the classification as set forth in Section B, Article 19 of the contract, which pertains to assistants, helpers, and apprentices.

You are advised that you did violate the contract requirements by working men on this project, paying them the rate of 60¢ per hour, since Contract Form PWA 51, Article 18, sets forth the wage scale as skilled labor $1.10 per hour and unskilled labor 45¢ per hour. Therefore you violated the contract when you used other than skilled labor for performing work which

required skilled labor according to the ruling of the U. S. Department of Labor.

You are directed to reimburse the men whom you employed as rodmen and used as skilled laborers, the difference between the rate actually paid them, 60¢ per hour, and $1.10, for which time these men were actually employed under the skilled labor classification.

The statement made in the third paragraph of the above letter was untrue and arbitrary and the statement in the last paragraph was unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

Plaintiff complied with the action of the contracting officer as hereinbefore mentioned and the above quoted written directions of the superintendent of construction and thereafter paid all workmen engaged in placing, fixing, tying, or fabricating reinforcing steel rods $1.10 per hour and paid all men who had prior thereto been engaged in such work the difference between 60 cents an hour and $1.10 per hour. The additional cost to plaintiff as a result of paying such workmen $1.10 per hour over what such cost would have been if he had been permitted to pay them 60 cents per hour, was $4,365.12.

At the time plaintiff was required to pay all men engaged on the work of placing steel reinforcing rods $1.10 per hour he found that some of the men were not sufficiently experienced to justify them being classed as skilled mechanics and it was necessary for him to discharge them. Those who were dismissed took the matter up with the Roanoke representative of the Public Works Administration advising him that they did not claim to be skilled mechanics and were willing to continue on the work which they had been doing at 60 cents per hour. As a result of this the matter was taken up with Hon. Clifton A. Woodrum, a member of Congress, who on March 31, 1934, communicated with the contracting officer with reference thereto, and on April 25, 1934, the contracting officer wrote Mr. Woodrum as follows:

Further reference is made to your letter of March 31, 1934, enclosing the attached letter dated March 29, 1934, with accompanying file addressed to you by the Chamber of Commerce at Roanoke, Virginia, advising that in connection with the construction work at Veterans' Ad-

ministration Facility, Roanoke, Virginia, the contractor laid off certain men engaged in tying reinforcing bars and replaced them with skilled mechanics. This action on the contractor's part resulted from a ruling made by the Public Works Administration that men "classified as skilled rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen." Under the terms of the contract the skilled workmen referred to must, to the fullest extent possible, be chosen "from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service" with a preference to "bona fide residence of the political subdivision and/or county in which the work is to be performed * * *."

It appears that the contractor upon being advised of the decision of the Public Works Administration referred to took action in accordance with the terms of its contract by making application to the Virginia State Employment Bureau for skilled mechanics.

While I regret that the men who had been engaged in tying reinforcing bars were replaced, I am sure you will appreciate that so long as the contractor strictly complies with the terms of his contract I can take no action in having them reinstated.

This was the only communication or ruling which the contracting officer made with reference to the matter. Neither the Secretary of Labor under paragraph 10, page 3 of specifications 1G, nor the Board of Labor Review under Articles 15 and 18 (f) of the contract considered or made any ruling or decision with reference to any intermediate or semi-skilled labor wage scale during the performance by plaintiff and his subcontractors of the work called for by the contract in suit.

During the progress of plaintiff's contract work defendant's supervising superintendent and his assistant as superintendent and inspector arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the men engaged on reinforcing steel work and caused an unreasonable amount of idle time of steel crews on the job. The actual excess cost and damage to plaintiff by reason of this unnecessary, unreasonable, arbitrary and unauthorized conduct was $4,291.93.

18. *Claim for $26,354.19, alleged excess wages required to be paid to apprentices, helpers, or semi-skilled carpenters.—*

The intermediate grade of semi-skilled carpenters or carpenters' helpers is generally recognized by industry and labor and is paid less minimum wage per hour than skilled carpenters. Members of this group are designated "rough carpenters," "carpenters' assistants," or "semi-skilled carpenters." Men working in this intermediate grade are permitted to make plain wooden forms for mass concrete, scaffolds, certain rough work on temporary frame buildings, etc. On this type of work, on open shop or nonunion projects, the Federal Emergency Administration of Public Works recognized and permitted the following ratios of "rough carpenters," "semi-skilled carpenters" or "carpenters' assistants" to skilled carpenters:

Type of work	Rough carpenters	Skilled carpenters
1. Finished work, such as millwork, trim, cabinet work, finished wood floors, ceilings, panels, etc.	1	1
2. Forms for unexposed concrete surfaces, and removal of such forms for reuse	4	1
3. Subflooring and sheathing	4	1
4. Scaffolding construction	4	1
5. Framing	4	1

Plaintiff's estimate of the cost of the carpentry work on which his bid was made was computed on the basis of the customary and recognized use of rough carpenters, and semi-skilled carpenters as apprentices, assistants or helpers to skilled carpenters at a minimum hourly wage rate of from 60 to 65 cents per hour. He accordingly prepared and posted his wage schedule, which at that time was approved. (See finding 17). Plaintiff paid such employees a minimum of 60 and 65 cents per hour, which was the prevailing rate of wage for such men and for the work which they did as rough carpenters, assistants or helpers in Roanoke and vicinity. This classification in the carpentry trade was recognized by the building industry and labor. Plaintiff's contract contemplated and authorized the use of rough carpenters, helpers and assistants at an intermediate hourly minimum wage rate between that for skilled and unskilled or common labor.

At the same time in March 1934 and for the same reason fully set forth in finding 17 defendant's supervising superintendent told plaintiff he could not pay an intermediate rate of wage to rough carpenters, assistants, apprentices or help-

ers, but that all such men must be paid a minimum hourly rate of wage of $1.10 per hour because the contract contemplated and authorized only two rates, one at 45 cents for common labor and the other at $1.10 for skilled labor and that any man who used a tool was a skilled mechanic and must be paid $1.10 per hour. Plaintiff protested to the supervising superintendent and the contracting officer as set forth in finding 17 relating to reinforcing steel work. The requirements concerning carpenters, etc., was a part of the same controversy. Solely on the basis of the submission in the superintendent's letter of March 15 and the reply of Hollenbeck on March 20, (finding 17) the defendant's supervising superintendent gave the above mentioned directions. The contracting officer made no independent decision or ruling on the matter. There was no controversy concerning the prevailing intermediate wage rate being paid by plaintiff. Plaintiff continued throughout the work to use semi-skilled carpenters for rough carpentry work and as assistants and helpers to skilled carpenters but paid them as ordered $1.10 per hour. There was never any issue or controversy between plaintiff and labor as to use of semi-skilled carpenters or as to the intermediate wage rates paid them.

The ruling and instruction requiring plaintiff to classify all rough carpenters and helpers and assistants as skilled labor and to pay them the minimum wage rate for skilled mechanics were unauthorized, arbitrary and so grossly erroneous as to imply bad faith.

The difference between the amount which plaintiff was required to pay for all rough carpentry or semi-skilled carpentry work and to carpenters' assistants, apprentices, and helpers at $1.10 per hour and the amount which he included in his bid and which he would have paid to men engaged on such work had he been permitted to pay them at the prevailing rates of 60 and 65 cents per hour, was $26,354.19.

19. *Claim for $9,730.27, to the use of the Roanoke Marble & Granite Company, Inc., subcontractor*, actual excess labor and overhead costs by reason of defendant's refusal to permit plaintiff's subcontractor to employ and use semi-skilled laborers as helpers, improvers and terrazzo grinding machine operators at an intermediate minimum wage rate

of 60 cents per hour. The Roanoke Marble & Granite Company, Inc., the subcontractor of plaintiff under the plaintiff's contract with defendant, entered into a contract with plaintiff on December 18, 1933, for the furnishing of certain materials and performance of all labor necessary to install and complete the tile, terrazzo, marble and soapstone work called for in plaintiff's contract with the defendant, for the total consideration of $37,703.80. Under this contract the subcontractor estimated that the cost of labor, materials and overhead for the work called for was $35,717.04. In making its bid to plaintiff the subcontractor examined plaintiff's contract and specifications for the construction work called for therein, and P. W. A. Bulletin 51 and other P. W. A. instructions relating to employment of labor, and in making its estimate of labor costs did so in the belief and on the basis that all skilled mechanics would be paid $1.10 per hour; that all unskilled and common laborers would be paid 45 cents per hour and that it might employ intermediate labor at the prevailing wage rate as experienced helpers, improvers or assistants to mechanics, as was the recognized practice and custom in the trade of installing tile, terrazzo, marble, and soapstone work. Accordingly the subcontractor estimated its labor cost at $10,404.75 on that basis, being $8,803.80 for setting tile and laying terrazzo, and $1,600.95 for setting marble and soapstone. The subcontractor's estimate contemplated the use of one helper at 60¢ per hour to assist each skilled mechanic at $1.10 per hour, with the use of sufficient common labor at 45 cents per hour to handle and move materials and to clean up the finished work. Skilled mechanics were available through the Tile Setters' Union at Roanoke, and experienced helpers and common laborers were available at the United States Reemployment Office.

The subcontractor's contract with plaintiff provided that the subcontractor would comply with all the requirements of plaintiff's contract with the defendant insofar as it related to the work covered by the subcontract.

The general and recognized custom and usage of the tile, terrazzo, marble, and soapstone setting trade were, at all times material to this claim, to employ and use intermediate

or semi-skilled labor, designated as improvers, assistants, apprentices, or experienced helpers, to serve skilled mechanics in setting tile, marble, soapstone, and laying and grinding terrazzo base and flooring, except intricate grinding, and to pay such semi-skilled labor an intermediate wage less than the wages paid to skilled mechanics but in excess of the wages paid to common or unskilled labor. Improvers and experienced helpers in this trade are men who are informed as to the different kinds of tile for particular spaces and who are able to select and prepare tile for setting, cut tile to fit spaces, grout the joints and clean the tile after it is set, mix the mortar for tile and terrazzo work, mix the plaster for setting marble and soapstone, drill the holes for and assist marble setters in placing angles and dowel pins. Experienced helpers or improvers were available for use on the subcontractor's job at 60 cents per hour, which was the prevailing rate of wage for that work in the Roanoke district. Common or unskilled labor in such work is used to move materials and clean up after the finished work.

In setting marble and soapstone it is the custom of this trade to use one skilled mechanic to set the tile or lay terrazzo, with one or more experienced helpers or improvers to prepare materials and assist the mechanic, and to use sufficient common labor to move materials. At least one experienced helper or improver is required to serve each skilled mechanic.

The subcontractor began work August 21, 1934, using skilled, semiskilled and common labor, as above indicated, on and after August 23, 1934. In the beginning the subcontractor, being a resident of Roanoke, thought that he might for that reason place his own local organization on the work and supplement it through the Virginia Reemployment Service, but found that he could not do so and that he must employ all labor except skilled mechanics through the Virginia Reemployment Service. Accordingly the subcontractor employed helpers through the Reemployment Service.

About September 15, 1934, shortly after the subcontractor began substantial production, defendant's supervising superintendent of construction, solely on the basis of the submission and ruling relating to reinforcing steel workmen

and carpenters' helpers and assistants, told and directed the subcontractor and plaintiff that only two classes of labor would be permitted to be employed on the work, namely, skilled mechanics at $1.10 per hour and common labor at 45 cents per hour; that there was no intermediate wage scale for that or any class of work being performed by the subcontractor under plaintiff's contract; that helpers, improvers, apprentices, and semi-skilled laborers who used tools could not be employed unless they were paid the mechanic's wage of $1.10 per hour and that any person who used a tool must be classified as a skilled mechanic and paid a minimum wage of $1.10 per hour. Both plaintiff and the subcontractor protested to defendant's supervising superintendent and to the contracting officer, but complied with the instruction and order given and continued the work to completion thereunder, before the contracting officer reversed the ruling and order of the supervising superintendent and sustained the contention of the subcontractor and plaintiff, as hereinafter mentioned.

Plaintiff's subcontractor paid the men engaged on the work above mentioned $1.10 per hour but it was necessary for him to increase the number of common laborers at 45 cents per hour to wait upon or "help" these men after they were classified as "skilled mechanics," but none of these common laborers did any semi-skilled work in the intermediate classification of helpers, improvers, apprentices, or semi-skilled laborers.

By reason of plaintiff's being prevented from employing and using improvers and experienced helpers the efficiency of the mechanics was impaired, in that it was necessary for them to cut their own tile, mix their own mortar and plaster, drill holes in marble, and perform all servicing work normally performed by more experienced helpers. As a result the labor of the skilled mechanics in setting the tile was increased and all labor costs were increased over the costs which had been estimated and which would otherwise have been necessary. The work was delayed and the production of work per day was reduced from an average of 150 feet to 100 feet per day; the labor costs per unit were increased for both skilled mechanics and common labor by reason of the

decrease in progress and the additional time it required to complete the work.

December 6, 1934, the supervising superintendent ordered plaintiff and the subcontractor to make retroactive payment of $1.10 per hour. This was done.

December 7, 1934, the subcontractor made written protest to plaintiff of this written ruling of the superintendent of construction and submitted letters from other tile and terrazzo contractors and statements from skilled mechanics that it was the custom of the trade to employ grinders as semi-skilled mechanics at intermediate wage rates for such work. This letter of December 7 from the subcontractor to plaintiff was as follows:

> Your letter of this date with copy of Capt. Feltham's letter of the 6th is received.
>
> In connection therewith wish to submit the following facts: Under our contract we thought we had the right to employ three classes of labor, mechanic, semiskilled, or what we term improvers and common labor and are still of that opinion, the definition of an improver or semiskilled being a man that can do more than just hand material to a mechanic and that can make tile cuts, run machines on terrazzo, repair tile, etc., but not good enough to do mechanical work. In the beginning of our work, we proceeded on that basis or theory, but in a conference with Mr. Dodd, of Inspector's office, which we believe you, the business agent of the Union along with writer and several of our men attended, we were told very positively by Mr. Dodd that we could not use any intermediate grade of labor, either a man was a mechanic or labor and if any man used a tool he was to be classed as mechanic. With this ruling we have literally complied by using only mechanics and common labor, such mechanics being secured through the Union and labor through reemployment office, for the reason had we been allowed to use semiskilled labor, it would have speeded the work considerably, thereby lowering the unit costs of installation.
>
> In an endeavor to comply with this ruling we are using ordinary labor on our grinding machines at 45¢ per hour and wish to say further that it is customary with terrazzo contractors to use semiskilled labor on grinding, at a higher rate than ordinary labor, usually running around about 15¢ hour more and we would have

liked very much to use such labor on this grinding rather than the labor now being used.

At no time, nor any place, we know about, nor the usual practice among terrazzo contractors to use mechanics to do grinding as it has never been considered skilled mechanical work, but as stated, semiskilled. In support of our position, we will present letters from various terrazzo contractors as to the usual practice in this connection.

If we are allowed to use semiskilled labor on this grinding, would be pleased to remove present grinding machine men and replace with above grade at 60¢ per hour which will lower the finished costs.

December 12, plaintiff submitted this letter to the defendant and wrote the supervising superintendent with reference to his order of December 6, as follows:

> Reference my contract with the Veterans' Administration for construction of Roanoke Veterans Hospital, under your supervision, and particularly your letter of December 6th regarding rate of pay for terrazzo grinding machine operators.
>
> In this connection I am enclosing copies of letters from two contractors engaged in this class of work, also copies of exchange of telegrams between Mr. Winstead and Mr. Gleason, President of the International, whose headquarters are in Washington. From this correspondence and telegrams it seems that the proper rate for this class of work is 60 cents per hour, and from copy of letter from Roanoke Marble & Granite Company, who is my subcontractor for this work on the above job, you will note how Mr. Wilson of this Company, became confused as to classification of men on this job.
>
> We will pay the men who have operated these machines 60 cents per hour for the time they operated the machines, and will furnish you with evidence that this is done, and we will pay 60 cents per hour for the grinding that is yet to be done, and we trust that this will meet with your approval.

December 13, 1934, defendant's superintendent of construction wired the contracting officer as follows:

> **Request interpretation if men running electrically operated terrazzo floor grinding finishing machines are considered skilled or unskilled labor Stop Contractor paying forty-five cents per hour for this class of work.**

As in the case of the submission by the supervising superintendent to the "Department of Labor" concerning reinforcing steel workers, the above telegram to the contracting officer was a misleading and false submission of the true controversy. Honesty required that the superintendent ask the contracting officer for an interpretation whether the work of operating terrazzo floor grinding machines should be classified as skilled or semi-skilled labor. The parties were in agreement that this work was not unskilled labor and there was no controversy about that when the superintendent made his ruling on the $1.10 per hour basis on December 6. On the same day the contracting officer wrote the superintendent of construction stating that "Reference is made to your telegram of December 13, 1934, requesting to be informed as to classification of men running electrically operated terrazzo floor grinding finishing machines at Veterans' Administration Facility, Roanoke, Virginia. It is required by this office that skilled mechanics be used for performing this work."

In this telegram the contracting officer did not decide the real controversy or dispute, which was whether the contract contemplated or recognized the usual and customary labor classification known as semi-skilled work at an intermediate wage rate, under the direction and supervision of skilled mechanics. The Contracting Officer finally got the question correctly stated when the Supervising Superintendent sent him the correspondence of the plaintiff and the subcontractor, and he then correctly decided the controversy as plaintiff and the subcontractor had all along contended. December 14, 1934, defendant's superintendent of construction wrote plaintiff quoting the above letter from the contracting officer.

December 14, 1934, the superintendent of construction wrote the contracting officer as follows:

> Acknowledgment is made of your letter of December 13, 1934, in reply to the writer's telegram of December 13th in connection with the contractor using unskilled labor to operate electric grinding machines on terrazzo floors at Veterans Administration Facility, Roanoke, Virginia.

For your information, you are advised that the contractor was notified on this date to comply with your instructions.

I am attaching herewith correspondence from the contractor and copies of letters and telegrams received by him from the McClamroch Company of Greensboro, N. C., from which you will note that it is customary to pay these operators 60c per hour. However, this is classified as skilled helpers under the State P. W. A. but not on Federal projects.

December 15 plaintiff wrote the contracting officer further protesting the decisions and rulings which had been made, as follows:

Reference is made to my contract for construction of Veterans Facility at Roanoke, Va. and particularly your letter of December 14th quoting telegram received by you under date of December 13th from Central Office of the Veterans Administration, relative to the rate of pay for operators of terrazzo floor grinding machines.

Under date of December 12th I submitted to you statements from two terrazzo contractors, and a statement from the President of the International Union of Brickmasons, whose members are doing work on this project, and all of this data bore out my contention as expressed in my letter of December 12th, that this work was not that of a skilled mechanic but that of a helper and should be rated accordingly.

I am submitting herewith further data in regard to this rate, in the nature of a statement from Mr. J. M. Fuhrman, Executive Officer of Divisional Code Authority for Terrazzo & Mosaic Contracting Industry Division of the Construction Industry, with headquarters at Louisville, Kentucky. You will note that Mr. Fuhrman says that men who run these machines are classified as helpers. This letter is dated December 12th.

I am also enclosing copy of a telegram, dated December 12th from Mr. Henry C. Burns, who, I understand, is the Union's representative of tile and terrazzo workers in the State of Virginia. Mr. Burns' headquarters are at Richmond, Virginia, and you will note that he is under the impression that this is the work of helpers, but suggests that Mr. Gleason, of the International Union, pass on this question. With my letter of December 12th I forwarded you copy of a telegram from Mr. Gleason in which he stated the operators of terrazzo grinding machines were classified as helpers.

> It is respectfully requested that you and Central Office again review all of this data, and with this information before you, namely, that of the Code Authority for the Industry, and that of organized labor and that of contractors engaged in this line of work on Government projects, all of which signify classification of terrazzo grinding machine operators as that of helpers, I believe you will agree with the contention set forth in my letter of December 12th that 60 cents per hour is the rate applicable for the operators of these machines.
>
> After this data has been thoroughly digested by you and Central Office I would like to have your reaction thereon.

December 22, 1934, the contracting officer wrote the superintendent of construction that "This matter is being looked into further and you will be advised in connection therewith at an early date." January 14, 1935, the contracting officer wrote the superintendent of construction as follows:

> Further reference is made to your letters of December 14, 1934, and December 19, 1934, concerning the classification of employees operating electric grinding machines for installation of terrazzo floors. This matter was taken up informally with the union representatives in Washington and they indicated that semiskilled laborers are customarily used on this type of work, under the supervision of a skilled mechanic and that intricate grinding was actually performed by a skilled mechanic.
>
> It would be appreciated if you would advise this office as to whether terrazzo grinding on this project has been completed and if not the extent of the work yet to be performed.

On January 15, 1935, the superintendent of construction wrote the contracting officer as follows:

> Reference is made to your letter of January 14, 1935, concerning the classification of employees operating electric grinding machines for installation of terrazzo floors throughout the buildings, at the Veterans Administration Facility, Roanoke, Virginia.
>
> For your information you are advised that terazzo grinding on this project has been completed.

As a result of defendant's rulings and requirements with reference to the classification of and wages to be paid to the workmen employed by plaintiff's subcontractor for installing and laying tile, terrazzo, marble, and soapstone called for by plaintiff's contract, the costs of labor were $9,730.27 in excess of what the reasonable cost thereof would have been had the defendant permitted plaintiff to use and pay semi-skilled labor as he had planned and upon which he based his estimates as hereinbefore set forth in these findings.

Plaintiff paid his subcontractor, the Roanoke Marble & Granite Company, Inc., the total consideration named in his subcontract of $37,940.77. Neither the plaintiff nor the subcontractor has been reimbursed or paid by defendant for any portion of the excess and extra labor costs incurred and paid by the subcontractor.

20. *Additional facts supplementary to the foregoing findings and a part of and applicable to the conditions and circumstances disclosed and set forth in the preceding findings.*—Early in plaintiff's work under his contract he began, as he had planned and as was customary and proper, to set up a large central concrete mixing plant and also to use at the site at certain places for certain small portions of concrete work not a part of the main mass concrete work, a portable paving concrete mixer. This was necessary for the speedy and proper prosecution of the work. Defendant's supervising superintendent and his assistant who held the position of superintendent-inspector, ruled and directed plaintiff that he could not use a central mixing plant. Plaintiff immediately took the matter to the contracting officer who ruled and decided that plaintiff's plan and equipment were proper and approved them. Shortly afterwards the defendant's supervising superintendent and his assistant arbitrarily and without reason, ruled and instructed plaintiff that he could not and would not be permitted to use the portable paving mixer in addition to the central mixing plant. Plaintiff took the matter to the contracting officer who approved as entirely proper the use of the portable paving mixer in addition to the central mixing plant. Defendant's officers at the site of the work showed evidence of resentment

at being overruled in their actions and from that time until the work was completed and in various ways entered upon a course of unreasonable, unauthorized and improper and unfair conduct and attitude toward plaintiff, his work and his officers and employees. This was due in part to a feeling of unfriendliness on the part of defendant's agents toward the contracting officer's office, and in part in a desire and for the purpose of punishing the contractor for objecting and protesting their rulings, directions and instructions, and also for the purpose of making it appear that plaintiff's force and plant were incompetent, inefficient and inadequate, and that plaintiff was responsible for seriously delaying the progress of the work rather than, as was the fact, that the work was being unreasonably delayed by failure of the government to have the necessary mechanical work properly performed. They made incorrect, misleading and untrue reports to the contracting officer's office and in many instances concerning the performance of the work and in their instructions, directions and requirements the defendant's officers at the site of the work failed to exercise an honest judgment.

As required by his contract the plaintiff under Article 19 made application to and secured his labor for various classes of work through the U. S. Employment Office at Roanoke. In requesting such labor he specified the class of work to be performed by the men requested and asked for men who had had experience in such work. The men so requested were supplied so far as the employment office was able to do so, and such of them as were sufficiently competent, experienced or able to perform the work were employed and used. The employment office and plaintiff and his subcontractors always gave strict preference to war veterans. Plaintiff and his subcontractors did not intentionally or knowingly fail to strictly comply with and conform to all of the wage and hour and other labor provisions of the contract and specifications and the regulations of the Federal Emergency Administration of Public Works.

After it had been held under the confused conditions and circumstances set forth in the preceding findings that plaintiff could use only two classes of labor, i. e., skilled mechanics and common laborers, it was necessary for plaintiff to

let some of his competent laborers go because they were not sufficiently experienced to be classified as skilled mechanics although they met all the requirements for semi-skilled workers for work of a semi-skilled classification. In this connection men on reinforcing steel work and semi-skilled carpenters and helpers and assistants were affected. Thereupon plaintiff made application to the U. S. Employment Office for skilled labor on work as reinforcing rodmen. Men highly skilled in reinforcing steel work could not be supplied and the employment office went outside the Roanoke district into other districts of the state in an effort to secure such men. A supply of men was sent to plaintiff. A number of them had not long been residents of Virginia but this fact was not known to plaintiff nor did plaintiff have any responsibility in that connection after the men had been certified by the employment office. Plaintiff used such of the men supplied as were sufficiently competent to perform the work. A number of them had to be rejected or dismissed for incompetency or lack of experience in reinforcing steel work. A very few of the men whom plaintiff found it was necessary to dismiss for incompetency in that work after they had been employed and tried out, were structural steel workers who were members of the International Association of Bridge, Structural and Ornamental Iron Workers' Union. They were structural steel workers and had no experience in reinforcing steel work. Under the contract the question of whether a man sent by the employment office should be accepted, employed or dismissed after he had been employed and tried out, and whether he was incompetent for lack of experience or otherwise was a matter solely for the determination and decision of the contractor. Defendant's superintendent and inspector had no authority as to whom plaintiff should employ or whom he should not dismiss. But defendant's officers at the site of the work did undertake arbitrarily to assume this authority and undertook to order plaintiff to retain laborers in his employ whom plaintiff considered incompetent and to order him to reemploy men whom he had rejected or dismissed for incompetency. Plaintiff, in a spirit of complete cooperation which he manifested throughout

the work, endeavored to comply even against his own judgment and that of his officers of long experience, but in some instances he could not and did not comply. In one instance, defendant's officers, on threat of punishment, ordered plaintiff to reemploy and use laborers whom plaintiff had dismissed for incompetency and lack of experience. Plaintiff did so but after several days had to again dismiss the man. Thereupon the defendant's officers and agents at the site arbitrarily and without cause dismissed and discharged from the job one of plaintiff's most experienced and competent men in charge of the reinforcing steel work. This man had had many years experience in reinforcing steel work and was highly skilled. He had been with plaintiff's organization for a number of years as foreman of reinforcing steel work.

As a result of plaintiff's action of rejecting and dismissing some of the men sent to him by the employment office for reinforcing steel work, a representative of the Roanoke Central Labor Union made a complaint to Mr. Woodrum, a member of Congress, and the Public Works Administration that plaintiff was violating his contract by refusing to employ men from Roanoke and employing men from Richmond sent him by the employment office.

Plaintiff was not advised and had no knowledge of these complaints. This was in May 1934. About the same time defendant's officers at the site of the work falsely and without the knowledge of plaintiff reported that plaintiff was trying to unionize the job with the idea and for the purpose of getting on the job a lot of his former employees from Alabama. Plaintiff never had any such idea or made such an attempt. Plaintiff did on June 22, 1934, with full knowledge and consent of the government and as he had a right to do, make a written agreement with Local Union No. 319, United Brotherhood of Carpenters and Joiners of Roanoke, Va., which provided "that in employing carpenters and joiners for the carpentry work in erecting the buildings in connection with the U. S. Veterans Hospital at Roanoke, Va., that the said carpenters and joiners will be secured through the Local Union's representative. * * * that the competent mechanics now employed, who desire to affiliate with the Local

Union, will be permitted to continue their work on this project after affiliating themselves with the Local union. * * * that the Local Union will secure a sufficient number of men to carry on the work". This agreement was complied with by both parties.

June 26, 1934, the Director of the Division of Investigations of the Federal Emergency Administration of Public Works had an Agent sent to Roanoke to make an investigation and report. This investigation was made during the period June 26 to July 10, 1934. A further investigation was made by the same agent August 20 and 21, 1934 and reports were made. Plaintiff had no knowledge of these investigations and reports until about a year later in June 1935. The investigator secured practically all his information on the basis of which he made his reports and recommendations from defendant's supervising superintendent and his assistant. The information furnished and the representations made by them to the P. W. A. investigator were greatly exaggerated, incorrect, misleading and in many particulars false. The P. W. A. investigator made his reports on the basis of the information, statements and representations so made to him by defendant's officers. Upon such information the reports stated (1) that plaintiff was violating the wage provisions of the contract; it was recommended (2) that the plaintiff be required to dismiss from the work all employees non-residents of Roanoke, Va., unless they could show actual residence in Virginia; (3) that one of plaintiff's key supervisory men be discharged because he had done labor work and because he was a resident of Florida (the sole and only basis for the charge made by defendant's officers to the investigator of the performance by this man of labor work was that in walking on the road to the site of the work he saw a rock about twelve inches or so in diameter which had fallen off a truck and picked it up and laid it out of the way to the side of the road); and (4) "that Algernon Blair, Contractor, be debarred from bidding on future contracts under the P. W. A. * * * that he be relieved of his contract for the erection of the Veterans Administration Facility at Roanoke, Virginia. * * * that the facts regarding the contracting for labor by Algernon Blair, Contractor, in violation of the Code of Fair Com-

petition for the Mason Workers Industry be furnished the Code Authority of the National Industrial Recovery Administration. * * * that the facts in this case be presented to the United States Attorney at Roanoke, Virginia, for his opinion as to whether prosecutive action will be instituted, with particular reference to the submission of certified payrolls * * * when the prescribed rates of wages have not been paid". These reports set forth that the investigator had been told by defendant's supervising superintendent and his assistant that plaintiff had placed and had to tear out and replace at least $30,000 worth of defective concrete and $6,000 worth of defective brickwork. These statements to the investigator were false.

Upon being advised by the Public Works Administration of complaint which had been made concerning the employment and payment of labor the contracting officer wrote the Emergency Administration of Public Works before the above-mentioned report was made that the contractor was paying the wages called for by the contract and was fully complying with the contract requirements as to securing laborers and mechanics for the project.

No action was taken by the Director of the Emergency Administration of Public Works on the information obtained from defendant's officers.

After plaintiff had completed his contract at Roanoke he was awaiting the award of a contract and notice to proceed on another substantial Public Works Administration building project as to which he had been advised he was the lowest bidder. Not knowing why the matter was being delayed plaintiff inquired of the Public Works Administration about the matter near the first of June 1935 and was advised for the first time that some unfavorable charges had been made against him in connection with the Roanoke project and that he should get in touch with Colonel Hackett, Director of Housing of the Emergency Administration of Public Works. Plaintiff immediately did so and asked Colonel Hackett concerning any charges and requested that he be given an opportunity to be heard thereon. Colonel Hackett advised plaintiff of the charges as hereinbefore set forth and granted plaintiff a hearing. The hearing was held before Director

Hackett and two other representatives of the Public Works Administration. Plaintiff met each of the charges and submitted his answer and proof thereon. After the hearing the Board of three considered the matter and found the charges to be groundless and dismissed them all. Thereupon plaintiff was awarded the other Public Works Administration contract and given notice to proceed. The contract was satisfactorily completed and plaintiff has been awarded and has performed other government contracts since that time.

21. *Claim for $15,180.52 by reason of defendant's requirement that plaintiff use local sandstone.*—The requirements with reference to the stone work called for under plaintiff's contract are set forth in specifications 9C, pages 1 to 4, inclusive. These specifications provided in part as follows:

> The contractor shall furnish and set all limestone, sandstone, or granite to complete the work as indicated on drawings or as specified.
>
> All stone work throughout the job shall be limestone, sandstone, or granite as indicated or specified. Materials indicated on drawings as stone shall be cut limestone or sandstone except where granite is indicated or specified. Stone work indicated on drawings as rubble shall be a random broken range ashlar local sandstone as hereinafter specified.
>
> * * * * *
>
> All rubble or broken range ashlar *stone work shall be a local sandstone of a buff color*, with a variegated run of quarry color, the darker shades predominating. (Italics ours.)

The specifications required the contractor to submit to the contracting officer for approval four samples each of the light colored and dark colored sandstone, two samples of limestone and two samples of granite, which should be typical of the extremes which he proposed to furnish. Subdivision (d) of Article 7 of the contract provided as follows:

> *Local preference.*—So far as practicable, and subject to the provisions of sections (b) and (c) of this article, preference shall also be given to the use of locally produced materials if such use does not involve higher cost, inferior quality, or insufficient quantities, subject to the determination of the contracting officer.

At the time of estimating his costs and making his bid plaintiff assumed that there was available, already mined, local sandstone of such character as could be sawed and otherwise easily worked with tools. He did not make any local investigation. After the contract had been made and the plaintiff had started with the work he made an investigation with reference to the stone available locally and found that in order to obtain stone locally it would be necessary for him to quarry and haul it to the site of the work. This investigation disclosed that the only local sandstone available was so hard and abrasive that it could not be sawed but had to be cut into proper shape and thickness with other tools. Plaintiff had a conference with reference to the matter with defendant's superintendent of construction and the contracting officer and insisted that there was no commercial sandstone, within the meaning of the specifications, available locally and asked to be permitted to obtain from either Tennessee or Ohio brown sandstone that could be sawed. The contracting officer had plaintiff and the superintendent of construction come to Washington for a conference with reference to the matter and the contracting officer, after hearing the plaintiff and considering the matter, decided and required plaintiff to use the character of sandstone obtainable locally near the site of the work. The contracting officer selected the local sandstone to be used in the buildings from samples of the sandstone submitted by plaintiff. This stone was hard and durable and available in commercial quantities near the site of the work. The proof does not establish that this stone, although harder than some other sandstone, was not local sandstone within the meaning of the contract. It was workable with tools and could be and was cut into narrow strips as required by the contract and the specifications for use in the buildings. The same stone had previously and has since been used locally and worked with tools into narrower strips than those required by the contracting officer to be used by plaintiff under his contract.

Plaintiff made no inspection of the stone to be used before the contract was executed, and defendant offered no information nor made any representation to plaintiff as to the type of sandstone available locally or as to the means of

obtaining the stone. The decision and requirements of the contracting officer with reference to the use of the local stone were not unreasonable, arbitrary or grossly erroneous. The contract did not call for "commercial sandstone" as that term might be understood in some other locality or state.

The net cost to plaintiff of quarrying and delivering the stone to the site of the work was $28,614.32. Had the contracting officer permitted and allowed plaintiff to purchase and use sandstone available in Tennessee, plaintiff could have purchased the necessary stone delivered at the job at a cost of not in excess of $13,433.80, a difference of $15,180.52.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The seven items making up plaintiff's claim of $146,091.60, damages alleged to have been sustained in performance of the contract dated December 2 and executed December 14, 1933, for which it is alleged the defendant is liable, are set forth in finding 13. The first six items of the claim, all involving excess and extra costs and expenses alleged to have been unnecessary and not required by the contract, relate to different items of work and delay and are all more or less related in fact and law as to the grounds upon which plaintiff bases his right to recover. The seventh item of the claim for $15,180.52 with reference to alleged excess cost for local building stone which plaintiff was required to use stands on its own facts.

The contract under which plaintiff's claim is made was wholly prepared and written by the defendant. Therefore, it should be stated at the outset that under the well established rule of law defenses to acts, conduct, rulings and decisions cannot be sustained where, in order to sustain them it is necessary to resolve all doubts in favor of the party who prepared and wrote the contract and specifications. *Callahan Construction Co.* v. *United States* 91 C. Cls. 538, at pp. 611, 612. It should also be stated that where the acts, conduct, rulings and decisions of the designated and authorized officers

and agents of one party to the contract in connection with the performance thereof by the other party, are so unreasonable, arbitrary and capricious as to make it difficult or impossible for the other party to literally comply with some provision of the contract, such other party is relieved from strict compliance and substantial compliance will suffice. In other words, acts and conduct which are abitrary, capricious, or unauthorized and so grossly erroneous as to imply bad faith amount to a breach of the contract or constitute a waiver of strict compliance by the other party. *United States* v. *Gleeson*, 175 U. S. 588; *United States* v. *United Engineering & Contracting Co.*, 234 U. S. 236; *Ripley* v. *United States*, 223 U. S. 695; *Standard Steel Car Co.* v. *United States*, 67 C. Cls. 445.

Art. 3 of the contract contained the usual provision in Government contracts, that the contracting officer might at any time by written order make changes in the drawings or specifications and within the general scope thereof; that if such changes caused an increase or decrease in the amount due under the contract or in the time required for its performance, an equitable adjustment should be made and the contract modified in writing accordingly; that no change involving an estimated increase or decrease of more than five hundred dollars should be ordered, unless approved in writing by the head of the department or his duly authorized representative, and that any claim for adjustment under that article must be asserted within ten days from the date the change is ordered unless the contracting officer should extend the time, and that if the parties could not agree upon the equitable adjustment to be made in the contract price the dispute should be determined as provided in Art. 15; but that nothing provided in Art. 3 should excuse the contractor from proceeding with the prosecution of the work. No such written changes were made. Art. 15 provided that all labor issues arising under the contract which could not be satisfactorily adjusted by the contracting officer should be submitted to the Board of Labor Review. No labor issue within the meaning of this provision arose under the contract. Article 15 further provided that all other disputes as to questions arising under the contract should be decided by the contract-

ing officer or his duly authorized representative subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative, whose decision would be final and conclusive upon the parties as to such questions, and that, in the meantime, the contractor should diligently proceed with the work as directed. Art. 5 of the contract provided that except as otherwise therein provided no charge for extra work or material would be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order.

Art. 9 of the contract related entirely to termination of the contract and to the matter of liquidated damages at the rate of $175 per day to be paid to the defendant by plaintiff in the event the contract was not completed by plaintiff within the time fixed by the defendant. This Article provided as follows:

> That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unfor[e]seeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

This provision does not apply to any of the claims here involved. The contract was completed within the time fixed by the defendant. For that purpose no extension of time was necessary or was made.

The time for completion of the work called for by the contract so as to relieve plaintiff of any liability to defendant for liquidated damages for delay was fixed by the defendant in the invitation for bids and in the specifications, and not by the plaintiff. The contract and specifications contemplated that the work called for by the contract would be completed at the earliest practical date after the contractor had been given notice to proceed. Plaintiff notified the defendant and defendant's mechanical contractor in writing of his desire and intention to complete the work by Nov. 1, 1934. The mechanical contractor was so notified January 24, 1934. The defendant was so notified as early as March 30, 1934. The contracting officer stated to the plaintiff in writing on April 4 and October 5, 1934 that early completion was desired. The work called for by the contract was completed within the period fixed by the defendant and no question as to liquidated damages to the defendant is involved.

The facts show that in making his bid and in estimating the performance costs for material, labor, and overhead, plaintiff fixed November 1, 1934, as the date when he would complete the work called for by the contract, and the facts further establish that, except for the unreasonable delays in performance caused by the defendant, all the work called for by the contract would have been completed by plaintiff by November 1, 1934, 106 days, or three and one-half months earlier than it was completed, and earlier than the period fixed by the defendant for liquidated damages purposes.

The facts established by the record as to the conditions, circumstances, acts and rulings of the defendant's designated and authorized agents and officers which gave rise to the excess and unnecessary costs and expenses of plaintiff under the first six items of the claim, and the amounts thereof as established by the proof, are set forth in findings 1 to 20 inclusive. Findings 1 to 20 inclusive set forth the facts established by the record as to the first six items, with reference to the acts, conduct, and the requirements and exactions of the defendant's supervising superintendent of construction and his assistant, the superintendent-inspector,

who were the authorized representatives of the contracting officer, which were unreasonable, arbitrary, capricious, and so grossly erroneous as to imply bad faith. They cannot be any better summarized here. The facts as to the reason for plaintiff's inability and failure to strictly follow and comply with the literal language of articles 5 and 15 of the contract, and the failure also of the contracting officer to strictly follow those provisions and his complete acquiescence in the course of conduct and procedure adopted and followed by plaintiff in this regard are also set forth in the findings.

Under the facts so established and set forth in the findings, and under the well-established principles of law hereinbefore mentioned, the plaintiff is entitled to recover as damages the actual increased costs and expenses for materials, labor, and overhead not included in his bid nor the contract price, for work and delay not contemplated or required by the provisions of the contract and specifications and resulting from and caused by the acts of the Government's authorized agents and officers.

The clear duty rested upon the defendant, acting by and through its agents and officers in charge of the work under the contract, not to delay the contractor in the performance of his work called for by the contract. It was also their duty to cooperate with plaintiff in every reasonable way to the end that the work as called for by the contract might be properly performed and completed as early as practicable so that neither the plaintiff nor the defendant would be put to extra costs or expenses. The proof conclusively shows that plaintiff fully cooperated in every way but that defendant entirely failed to do so. The proof shows beyond doubt that defendant did seriously delay the plaintiff in his performance; that defendant's officers at the site of the work deliberately and without reasonable cause, delayed plaintiff and deliberately sought to punish him for contesting their instructions, thereby causing plaintiff's costs and expenses to be greatly increased in certain particulars over the contract price and over what his performance costs would otherwise have been. The acts of the defendant's supervising superintendent of construction and his assistant, which the con-

tracting officer could not and did not prevent when properly, under the circumstances, brought to his attention by plaintiff, constituted a violation and breach of the express and implied stipulations and obligations of the defendant under the contract. The decisions are uniform that where the defendant unreasonably delays a contractor it is liable to him for the damages resulting from such delay. The decisions are also uniform that where the defendant substantially contributes to the failure or inability of a contractor to comply strictly with some contract provision, such provision as well as compliance therewith is waived. *Standard Steel Car Company* v. *United States*, 67 C. Cls. 445. *United States* v. *United Engineering and Contracting Co.*, 47 C. Cls. 489, 234 U. S. 236. Especially is this true where the particular provision is procedural and one intended for the benefit of the defendant. Where a contract provides that a contractor shall appeal within 30 days from the decisions or findings of the contracting officer and, as was the case here, the failure of the contractor to so appeal is caused by the acts and conduct of the Government, the contract provision cannot be set up by the Government as a defense. *Penker Construction Co.* v. *United States*, 96 C. Cls. 1. In all such express provisions concerning appeals to the head of the department there is clearly implied an undertaking by the Government that its officers will cooperate with the contractor and not be guilty of any act or conduct which will place in the way of a contractor obstacles of such a character as to make it unreasonably difficult or impossible for the contractor to effectively comply literally with the provisions and strictly follow the method expressly outlined. In this case the acts and conduct of defendant's officers at the site of the work and the effect thereof were of such a nature that it was impossible for plaintiff to protest in writing each time in the usual way through the officer at site of the work, to get a written ruling from the contracting officer at Washington and then to appeal in writing to the head of the department. The contracting officer realized this and acquiesced in the procedure followed by plaintiff of making prompt and full oral protests to the officers at the site and to the contracting officer

and the holding of conferences by the contracting officer and plaintiff for the discussion of such protests.

There is also an implied undertaking on the part of the Government in such provision as Art. 5, hereinbefore referred to, that if work or material not called for by the contract and specifications is required by the authorized representatives of the contracting officer, to be performed or furnished, a written order therefor will be given, and if there is a failure or refusal to give such order and the contractor is forced or compelled by other means, as was done in certain instances in the case at bar, to do such work or furnish such materials, there is a breach of the contract. The contractor is, therefore, not barred from recovering his extra costs and expenses because such work or material was not ordered in writing, and the contract provision cannot be set up by the defendant as a defense to the claim.

Art. 15 of the contract relating to disputes also clearly contemplated and there was, therefore, an implied agreement that the defendant's designated and authorized representatives, agents, and officers in charge of the work would not interfere with or hinder the contractor in questioning the propriety or correctness of their acts, instructions or requirements during the prosecution of the work and in submitting his protests and objections. Above all, there was clearly implied in such provision an obligation on and undertaking by the defendant not to commit or permit any act intended as punishment of the contractor for so attempting to invoke the contract provision and follow the procedure therein provided so as to obtain a fair and impartial decision of disputes on the basis of a true state of facts and circumstances. *Ripley* v. *United States*, 223 U. S. 695; *Globe Grain & Milling Company* v. *United States*, 70 C. Cls. 595.

The facts and circumstances established by the proof in the case at bar show that the defendant's supervising superintendent of construction and his assistant were guilty of acts of punishment and such unreasonable, arbitrary, capricious, and grossly erroneous acts and conduct toward plaintiff and his officers and employees engaged in performance of the work as to make it impossible for plain-

tiff openly, fairly, and in the ordinary manner to protest the many acts, conduct, requirements, rulings, and decisions of such officers to the contracting officer to the end that plaintiff might obtain an open, fair, and independent decision from the contracting officer on disputes, between the defendant's agents and officers in charge of the work and the contractor. The proof in this case shows that throughout the performance of the contract the plaintiff, his superintendent, his foremen, and his employees endeavored in every way possible to follow and comply with all reasonable instructions, orders, and requirements of the defendant's supervising superintendent of construction, and his assistant, and that the plaintiff and his officers and employees cooperated in every way with the defendant's officers in expediting the work and in performing it strictly in accordance with the contract and specifications and in accordance with good engineering and construction practice. Plaintiff and his supervisory organization were highly experienced in the type of construction work called for by the contract and there was not at any time any attempt on the part of plaintiff or his representatives in charge of the work not to meet, fulfill, and comply with all provisions and requirements of the contract and specifications. The plaintiff and his officers and employees were not guilty of any acts or conduct which delayed the prosecution and completion of the work. The plaintiff at all times had on the work an adequate, experienced, and capable force of officers and men, and sufficient and adequate material and equipment for the proper prosecution and performance of the work as called for by the contract and specifications, and for completion thereof by November 1, 1934.

In the early stages of the work under the contract certain disputes and disagreements arose between plaintiff and the defendant's officers in immediate charge of the work, with the result that the plaintiff protested to the contracting officer. The contracting officer sustained plaintiff's protests and overruled the instructions and orders of the defendant's representatives in charge of the work. The facts and circumstances and the subsequent conduct of these officers show that they resented having their instructions protested bv the

contractor and overruled. They thereupon entered upon a course of conduct, for which the assistant to the supervising superintendent of construction was primarily responsible, which could only have for its purpose the punishment of the plaintiff, his superintendent, and foremen for objecting to and protesting their orders and instructions. In many respects they became unreasonable, capricious, and arbitrary in their conduct toward and in their orders to the contractor. They acted in such a way as to retard and delay the progress of the work and to cause the contractor unnecessary performance costs and expenses. In many instances the defendant's superintendent-inspector with approval of the supervising superintendent, recorded and reported incorrect, misleading and false conditions and facts to the contracting officer in Washington. Plaintiff concluded, and in this he was fully justified, that it would make a very bad situation much worse and that it would be impossible, within the bounds of reasonable limits, to make written protests in each instance through the supervising superintendent of construction to the contracting officer. In these circumstances plaintiff justifiably concluded that the best and most practical way of handling the matter of protests and to relieve his superintendent of construction of a task impossible of performance in addition to his other duties, that two additional capable, experienced, and trusted employees should be sent to and stationed at the site of the work to relieve the superintendent of this impossible burden. This was done. Thereafter these representatives of the plaintiff devoted their entire time to the task of acting as conciliators between plaintiff and the defendant's supervising superintendent of construction and his assistant and, personally to submit to and discuss with the contracting officer in Washington the necessary protests, and to promptly and fully lay before him the conditions and circumstances under which plaintiff was operating at the site of the work. The contracting officer seldom made a definite decision but, after discussion of the matters with plaintiff's representatives, he stated that there was little that he could do; that he would do what he could and that plaintiff would just have to do the best he could to get along with the defend-

ant's officers in charge of the work. In the early period of the work under the contract the plaintiff requested the contracting officer to remove the assistant to the supervising superintendent of construction who acted as defendant's inspector, because of his unreasonable and arbitrary attitude and conduct, and to place someone else in that position, but the contracting officer declined to do so. This was a reasonable request on the part of the contractor and was justified under the conditions and circumstances which obtained. The contracting officer was misled in many instances by incorrect, misleading and false statements of fact originating with the defendant at the site of the work, of which plaintiff had no knowledge.

The whole evidence of record taken together shows and we have so found that on all of plaintiff's protests concerning items 1 to 6 inclusive the final decisions and conclusions of the contracting officer, where he made decisions or reached independent conclusions, were all in favor of plaintiff. The contract certainly did not contemplate or compel the plaintiff to appeal to the head of the department from a decision or conclusion not in writing, or from a favorable decision or conclusion, or to appeal to enforce a favorable ruling.

With these observations and conclusions upon the facts as established by the record, and which apply to the first six items of the claim, these items will be discussed separately.

ITEM ONE

This item of the claim is for extra costs and expenses which the proof shows amounted to $51,249.52 as a result of plaintiff being delayed for a period of more than three months in the completion of the work called for by the contract beyond the date when the plaintiff would, otherwise, have completed the same. The damages claimed and proven under this item for this delay are independent of the excess costs and damages claimed, and hereinafter mentioned under other items of the claim. The facts with reference to this delay and the increased costs are set forth in findings 14 and 20. The proof shows that the contracting officer delayed unreasonably, either in compelling the mechanical contractor

to proceed with his contract with the defendant so as not unreasonably to delay plaintiff or in sooner terminating the contract of the mechanical contractor for failure properly to proceed, and to re-let the same so that the plaintiff would not be delayed in the performance of his work. Plaintiff had no control over the mechanical contractor or of the mechanical work which the defendant required to be done and there was a clear duty resting upon the defendant to take such action with reference to the mechanical work as might be necessary to avoid any unreasonable delay in the prosecution and completion of the work called for by plaintiff's contract. The failure and refusal of the mechanical contractor to commence and properly to prosecute the work called for by his contract with the defendant are not chargeable to plaintiff. All that plaintiff could do, or was required to do, was to inform the contracting officer that his work was ready for the mechanical work and to protest the delay and call the same to the attention of the contracting officer, which the plaintiff did on numerous occasions in proper time and in such a way as to enable the defendant to take proper action to have the mechanical work performed and prevent the delay. Plaintiff began to protest this delay in January 1934 and continued to do so until June 26, when the mechanical contractor abandoned his contract and it was formally terminated. The contracting officer telegraphed and wrote the mechanical contractor from time to time urging him to commence and proceed with his work and called his attention to the fact that the construction work was being delayed by his failure properly to prosecute the work. Early in March 1934, three months before the mechanical contract was terminated, the contracting officer advised the mechanical contractor that his contract would be terminated unless he showed improvement in prosecuting his work. Practically no improvement was made. The failure of the contracting officer to earlier terminate the mechanical contract may have been and doubtless was influenced by the misleading, incorrect and false reports made to him by the defendant's inspector that plaintiff was not being delayed by the mechanical contractor but that the mechanical contractor was being delayed by the plaintiff. But plaintiff had no knowledge of these

false reports and would not be chargeable with them under any circumstances. The contracting officer was furnished with the true state of facts and conditions by plaintiff. Had the defendant made a reasonable investigation into the ability of the mechanical contractor to proceed properly with his contract during the early part of the period when he should have been engaged upon the work, it would have found that the mechanical contractor did not have adequate materials, equipment and finances to carry out his contract. The contract was terminated June 26, 1934, when the mechanical contractor advised the contracting officer that he would not be able to proceed with and carry out his contract. At that time a considerable portion of plaintiff's work had been performed and his work was further seriously retarded and delayed notwithstanding the efforts of the bondsmen of the mechanical contractor to get the mechanical work moving and to re-let a contract therefor to another mechanical contractor. In these circumstances the defendant must, under its contract with plaintiff, answer for the damages, amounting to $51,249.52, caused by this delay.

ITEM TWO

The damages of $25,886.84 claimed under this item represent increased costs for material and labor for outside scaffolds by reason of unreasonable, unauthorized, arbitrary, capricious, and grossly erroneous conduct and acts on the part of the authorized officers of the defendant in charge of the work. Plaintiff endeavored in every way that could be reasonably required of him, under the contract, to prevent this increased cost, without success. The facts applicable to this item of the claim are set forth in findings 15 and 20. This conduct on the part of the representatives of the Government in charge of the work was brought to the attention of the contracting officer, but nothing was done about it. The amount of $10,466.88 of this item of the claim represents the actual cost of material and labor for outside scaffolds around all the buildings which were not called for or required by the contract, and $12,990 represents extra and unnecessary labor costs for brick masons. Plaintiff incurred the extra costs of $25,886.84 in order to overcome an almost impossible con-

dition and in order to avoid a larger loss and damage by reason of unreasonable, unauthorized, arbitrary, and grossly erroneous action and exactions by the defendant's officers in charge of the work in connection with the brickwork on the buildings as punishment for the refusal of the contractor to erect the scaffolds when first orally instructed so to do. The defendant's supervising superintendent of construction refused to give a written order for the scaffolds because he knew that the contract did not require such scaffolding. The balance of the item of $2,429.96 represents the unnecessary and excess costs resulting from unauthorized and unreasonable inspection requirements in connection with mortar joints generally and with reference to brick work under windows and openings in the building, between the time the plaintiff was told that he would have to use outside scaffolds around all the buildings and the time when plaintiff surrendered to the demand and erected the scaffolds in order to avoid the unreasonable and unauthorized requirements in connection with the brick work. Plaintiff is entitled to judgment for the amount of this item of the claim.

ITEM THREE

This item of the claim as established by the evidence is $9,033.21 and represents extra and unnecessary expenses due to unreasonable, arbitrary, capricious and unauthorized acts and rulings of the defendant's officers in charge of the work. It is made up of (1) salaries and expenses, amounting to $4,952.95 of two men which it was necessary for plaintiff to station at Roanoke to handle matters arising from the conduct, instructions and orders of the agents of the defendant; (2) cost of $2,620.66 for bolting metal concrete form pans, which bolting was unnecessary and not required by the contract; (3) cost of $1,352.10 for performing certain fine grading work in the basement of certain buildings a second time; and (4) $107.50, extra cost of two-way temperature steel improperly required by defendant's superintendent of construction to be furnished and installed by the plaintiff.

Upon the facts established by the record and set forth in the findings, plaintiff is entitled to judgment for $9,033.21 for this item of the claim. See findings 16 and 20.

ITEM FOUR

This item of the claim, as established by the proof, in the amount of $8,657.05, represents $4,365.12 for excess costs for wages which plaintiff was required to pay certain employees in connection with the placing of reinforcing steel rods by reason of demands by the defendant's supervising superintendent of construction as the authorized representative of the contracting officer, and $4,291.93, excess and unreasonable costs and expenses resulting from direct and improper interference with the reinforcing steel work under the contract by the defendant's officers in charge of the work. The facts established and applicable to this item of the claim are set forth in findings 17 and 20.

This was a Public Works Administration contract prescribed by the Federal Emergency Administration of Public Works and carried out through the office of Director of Construction of the Veterans' Administration with funds supplied by the Public Works Administration of which the Secretary of the Interior was the Administrator. A reading of the contract, Art. 18, which is set forth in finding 17, the P. W. A. Bulletin 51, P. W. A. Release No. 56 and letter of the Administrator of the Federal Emergency Administration of Public Works, together with a schedule showing the action taken by a committee composed of representatives of the contractors, labor, and borrowers of public funds acting under authority of the Administrator of the Federal Emergency Administration of Public Works, and The Virginia Public Works Advisory Board, shows that plaintiff's contract contemplated and provided for three classes of labor—namely, skilled labor at a minimum of $1.10; unskilled labor at a minimum of 45 cents an hour; and semi-skilled labor, such as assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen and mechanics and who were not to be termed as unskilled laborers, at an intermediate rate of wage between the minimum fixed for labor specifically classified as skilled labor and labor specifically classified as unskilled or common labor. Subsection (4) of Art. 18 of the contract, when read in connection with other provisions, seems plain enough on this point, but before

making his bid, which necessitated an estimate for the cost of the various classes of labor necessary to perform the work called for by the contract, the plaintiff wrote the Secretary of the Interior, as administrator of the Federal Emergency Administration of Public Works, with reference to the matter for an interpretation of the contract labor classification provisions of the contract and of Release No. 56 of the Public Works Administration. The Administrator replied that the wage provisions of the P. W. A. contract, under which plaintiff was preparing his bid, anticipated that there would be certain semi-skilled workers who would receive wages in an intermediate grade at less than the rate for skilled workers mentioned; that the Public Works Administration had not predetermined the wage rate for such intermediate grades; that the wage rate set for skilled workers took into consideration the very restricted working week of 30 hours provided by law, and that in setting the wage rate for any intermediate grade the same factor should be taken into consideration and that "It is, of course, provided that carpenters' helpers, etc., should not be classed as common labor." In making his bid plaintiff took these matters into consideration, as well as the usual, customary and recognized labor classifications, and estimated for the employment and use of certain laborers in semi-skilled classifications at prevailing intermediate rates of wages as customary in the trades, between the minimum prescribed for skilled labor and the minimum wage rate prescribed for common labor. At the beginning of the work plaintiff prepared his schedule of wages showing the skilled, unskilled, and intermediate grades and rates and this schedule was approved by the supervising superintendent of construction as the contracting officer's authorized representative, and it was posted. Later, as detailed in the findings, the defendant's supervising superintendent without any justifiable reason and contrary to the usual and customary practice recognized by labor, industry and the government and contrary to the intent and meaning of the provisions of Art. 18 and the ruling of the Administrator of the Federal Emergency Administration, notified the plaintiff that he would not be permitted to use workers classified as semi-skilled labor at an intermediate

wage rate between the minimum fixed for skilled labor and that fixed for common labor, and that any worker who was not engaged in performing strictly common labor must be classified as skilled labor and paid $1.10 an hour as a skilled mechanic. Plaintiff protested to the supervising superintendent and the contracting officer but nothing was immediately done about it. The contracting officer did not make an independent decision on the matter. Neither defendant's supervising superintendent of construction nor the contracting officer ever regarded or considered the matter of interpretation of the contract concerning classification of labor as a labor issue or a matter properly to be submitted to and considered by the "Board of Labor Review" mentioned in Article 15. As set forth in finding 17, the defendant's supervising superintendent of construction on March 15, 1934, wrote a letter addressed to the "Department of Labor, Washington, D. C.," stating that "there being *only two scales*, *skilled* and *unskilled* labor [on the project], this office is *unable to determine* in *which class* the reinforcing steel rodmen should be placed," and asking "your interpretation" as to "whether concrete reinforcing steel rodmen, who fabricate and place reinforcing steel in forms, are considered skilled workmen." This misleading letter of "submission" started a chain of events which finally resulted in rulings which were followed by the contracting officer which were unauthorized, arbitrary, and so grossly erroneous as to raise the implication of bad faith. Of course, the bad faith originated with the office of the defendant's supervising superintendent of construction, but it permeated every subsequent action and ruling, with reference to intermediate labor classifications concerning reinforcing steel work, carpentry work and tile and terrazzo work. The contracting officer finally, as hereinafter set forth under item six, correctly decided the real question involved and correctly interpreted the contract when he held that terrazzo grinding, etc. should be classified under the contract as semi-skilled labor at an intermediate wage rate. But that decision came too late to be of any value to plaintiff as all of the work in connection with which the question arose had been completed.

On March 20, 1934, one Hollenbeck, the "Administrative Assistant for the Veterans' Placement Service, Department of Labor" at Washington, wrote the defendant's supervising superintendent of construction at Roanoke in reply to his letter of March 20, *supra*, that "The determination of the Public Works Administration" was "That men classified as steel rodmen (reinforcing) who place, fix, tie, or fabricate steel rods in forms should be considered skilled workmen" and that the carrying of steel material to the rodmen could and was, usually, done by unskilled labor. This letter did not decide or purport to decide the true question involved between plaintiff and defendant. It is perfectly obvious from the letter of March 15, of the defendant's supervising superintendent of construction, which was written by his assistant, that he positively and definitely decided the question involved and asked for an interpretation on a matter concerning which there was no controversy. There was never any controversy about the fact that if the contract *did* contemplate and recognize *only two* labor classifications, reinforcing steel work would have to be placed in the skilled labor class and not the unskilled or common labor class. Moreover plaintiff was paying the prevailing intermediate wage rate, and there was no controversy about that. Therefore the dispute between the parties was solely one which concerned the interpretation of the contract, and under Article 15, was one for the independent decision of the contracting officer. But as above stated he was led astray and did not really decide it until much later. The true question involved was not one for decision under the contract either by the Labor Department or the Public Works Administration, and the so-called ruling of March 20, on a question which was not in dispute was not binding and conclusive on plaintiff. Plaintiff never saw the letter of March 15, from defendant's supervising superintendent to the "Department of Labor" and did not at any time have knowledge of its contents and neither did the contracting officer. The contracting officer only saw Hollenbeck's reply of March 20.

Upon receipt of the Hollenbeck letter a day or two later the defendant's supervising superintendent of construction notified plaintiff that the "United States Department of

Labor" had ruled that men who worked at placing or tying reinforcing steel rods should be classed under the contract as skilled laborers; that plaintiff had violated the labor classification provisions of the contract and that he must pay all men engaged on reinforcing steel work $1.10 an hour and all those who had theretofore been paid at an intermediate rate must be paid the difference between 60 cents an hour, which they had been paid, and $1.10 an hour. Plaintiff still protested the supervising superintendent's instructions to the contracting officer and a conference thereon was held between the contracting officer and plaintiff. The contracting officer apparently felt bound by the statements in the letter of March 20, and took no independent action on the matter. See *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603, 626, 627, 629.

In connection with the work of placing and tying reinforcing steel, plaintiff had on the job a foreman of long experience in reinforcing steel work, under whose direct supervision and instruction all of the reinforcing steel laborers worked. The Government Employment Office, at Roanoke, Virginia, from which plaintiff obtained his laborers in accordance with the provisions of the contract, was unable to supply skilled mechanics for reinforcing steel work but that office was able to and did supply workers who had had sufficient experience in this type of work to qualify them for classification for semi-skilled work. They were able to do the work for which they were furnished. But when it was ruled that plaintiff could only use skilled mechanics on this work plaintiff had to let many of the men go. (See letter of April 25, 1934, of contracting officer, finding 17).

There is no evidence whatever in this record to show who, in the Public Works Administration in Washington, made the statement which the administrative assistant for the Veterans Placement Service in the Department of Labor, at Washington, transmitted by letter of March 20, to the supervising superintendent of construction on the basis of which plaintiff was required to classify reinforcing steel work as skilled labor and to pay reinforcing steel workers at the rate of $1.10 an hour. It would appear that because the answer to the question as submitted in the letter of March 15,

was so obvious the matter was not given serious consideration by either the Department of Labor or the Public Works Administration inasmuch as it was handled by the Veterans' Placement Service in the Department of Labor. No one, connected with plaintiff's contract knew or now knows from whom Hollenbeck got the information which he transmitted to defendant's supervising superintendent of construction. Whoever passed upon his request as stated in the letter of March 15, had to assume that only two grades or classifications of labor were authorized by the contract (which was the sole question in issue) and if this had been true there would have been justification for the statement transmitted to the defendant's representative. Plaintiff never paid nor claimed that men engaged on reinforcing steel work should be paid at the common-labor minimum wage rate. There was at one time subsequent to March 20, an allegation by defendant's supervising superintendent's assistant that plaintiff had paid some of the reinforcing steel workers the common labor wage rate of 45 cents per hour, but this was not true. The action, for which defendant is responsible, as to the manner in which the labor classification question was disposed of and enforced, was arbitrary, capricious, and so grossly erroneous as to imply bad faith.

Counsel for the defendant contend that plaintiff is barred from recovering on this and other similar items because he did not submit the matter of whether the contract authorized the use of an intermediate grade of labor at an intermediate wage rate to the Board of Labor Review for decision. But we think this contention is without merit for the reason that the question involved was not a labor issue within the meaning of Art. 15 and Art. 18 (f), but was simply a question whether the contract contemplated and, therefore, authorized the use of an intermediate grade of labor at an intermediate minimum wage rate. This question had already been considered, decided, and settled by the Administrator of the Federal Emergency Administration of Public Works six months before the defendant's supervising superintendent of construction and his assistant conceived the idea in March 1934 that they would force plaintiff to pay all employees not clearly falling within the common labor class the minimum

wage rate of $1.10 an hour provided for skilled mechanics. Moreover, neither the contracting officer nor the supervising superintendent ever considered the question one for submission to the Board of Labor Review, and even if the question had been one proper for submission to the Board of Labor Review, it was the duty of the defendant to submit it to the Board since it was the defendant, and not the contractor or labor, who raised the question. The contract (Art. 15) did not provide that "all issues concerning labor" shall be decided by the Board. Instead it provided that "all labor issues *which cannot be satisfactorily adjusted by the contracting officer* shall be submitted" to the Board. The contract was wholly written by defendant and any doubt that might exist as to whether plaintiff should be held barred, because the real question was not submitted to the Board, must be resolved against the defendant. The common understanding of a statement that an issue shall be submitted to a certain tribunal without indicating who shall submit it is that the person who raises the issue shall be the one to submit it.

Plaintiff is entitled to recover $8,657.05 under this item of the claim.

ITEM FIVE

This item of the claim as established by the evidence is $26,354.19 and represents the difference between the intermediate minimum prevailing wage rates of 60 and 65 cents an hour fixed and paid by plaintiff for semi-skilled carpentry work and the minimum of $1.10 an hour which the defendant compelled plaintiff to pay for such work. See finding 18. This item of the claim is governed by what has been said under the preceding Item 4. What has been there said is applicable here. Plaintiff is entitled to judgment.

ITEM SIX

This item of the claim as established by the proof is $9,730.27 and represents the difference between the intermediate prevailing minimum wage rate paid by plaintiff's subcontractor, the Roanoke Marble & Granite Co., Inc., for labor of a semi-skilled classification and the minimum of $1.10 an hour which the defendant compelled that contractor to pay for such semi-skilled labor on the same grounds, for

the same reasons and under the same circumstances as set forth under Item 4 above. See finding 19. The only difference between this item and the preceding items 4 and 5 is that the contracting officer finally decided the question in favor of the contractor as he had contended all along as to all three of the items. In other words the contracting officer decided and ruled in writing on January 14, 1935, that the contract did contemplate, and provide for intermediate classifications of labor at a minimum wage rate between that fixed for skilled labor and unskilled or common labor. However, plaintiff was not reimbursed for the excess cost which he had been ordered to pay. Plaintiff is entitled to judgment for the amount of this item.

ITEM SEVEN

Under this item of the claim plaintiff seeks to recover $15,180.52 on the ground that the contract and specifications provided for the use of "commercial" sandstone and that the contracting officer required plaintiff to use silica sandstone locally available and acquired, which, it is contended, was not sandstone within the meaning of the specifications.

The facts with reference to this claim are set forth in finding 21. The specifications provided that "Stone work indicated on drawings as rubble shall be a random broken range ashlar * * * local sandstone, as hereinafter specified. * * *. All rubble or broken range ashlar stone work shall be a local sandstone of a buff color, with a variegated run of quarry color, the darker shades predominating." When making his bid plaintiff assumed that there was available locally a soft sandstone that could be easily sawed into shape. Without making any investigation with reference to the matter, plaintiff wired a man near Roanoke, who, plaintiff had been advised, owned a quarry, for the price which he could supply sandstone. Plaintiff received a reply quoting a price. Plaintiff made his bid accordingly. Plaintiff further assumed that the price quoted contemplated delivery of the sandstone at the site of the work. Later, after the contract with defendant had been made, plaintiff found that the owner of the stone had no operating quarry, that the stone was covered with overburden and that the

price which had been quoted to him was for unquarried stone. Plaintiff further found that the local stone was not the kind of sandstone which he had in mind when he made his bid; that the only stone which could be obtained locally was too hard and abrasive to be worked with a saw but had to be split or cut into proper shape and thickness with other tools. Plaintiff protested being required to use this stone and endeavored to have the contracting officer allow him to use Tennessee or Ohio brown sandstone which was of a softer grade and could be sawed and more easily cut into shape, which stone, the proof shows, could have been purchased by plaintiff and delivered on the job at a cost of $15,180.52 less than it cost plaintiff to quarry, haul, and cut the local sandstone.

The proof is not sufficient to justify the allowance of the whole or any part of this item of the claim. The contract did not call for "commercial sandstone" as that term may have been understood by plaintiff. It called for "local sandstone." There are several grades of sandstone. The proof is not sufficient to show that the local stone which plaintiff was required to use did not come within the definition of the word "sandstone" or that it was not sandstone within the meaning of the specifications. The definition of the word "sandstone" in petrology, as given in Webster's New International Dictionary, is "a sedimentary rock consisting of sand, usually quartz, more or less firmly united by some cement, as silica, iron oxide, or calcium carbonate. Sandstones vary in color, being commonly red, yellow, brown, gray or white." There was no soft sandstone of the character which plaintiff had in mind to be found locally.

The proof does not show what portion of the $[illegible]8,614.32, which it cost plaintiff to unburden, quarry and deliver the local sandstone to the site of the work, represented the cost of uncovering and quarrying the stone which he did not contemplate he would have to do. Plaintiff is not entitled to recover on this item of the claim.

Judgment will be entered in favor of plaintiff for $130,-911.08. It is so ordered.

JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

MADDEN, *Judge*, dissenting in part.

I am unable to agree with the disposition which the Court has made of items 2, 3, 4, 5, and 6 of plaintiff's claim. These items appear in Finding 13 and relate to the requirement that outside scaffolding be used, to unfair conduct of the defendant's Superintendent and Inspector, to increased wages paid to reenforcing steel rodmen and carpenters, and to increased costs and wages resulting from rulings made with reference to the stone workers and terrazo grinders.

In each of these situations a serious dispute arose between plaintiff and the defendant's agent on the job. Plaintiff, instead of submitting the disputes to the Contracting Officer and insisting upon a ruling which he could appeal to the Head of the Department, as he had a right to do under Article 15 of the contract, either acquiesced in the Superintendent's ruling, or took the matter up informally with the Contracting Officer and acquiesced in his statement that he could not give plaintiff any relief.

I think the Government has the right to contract, if the contractor is willing, that the Government shall not be subjected to damage suits for disagreements between its inferior agents and the contractor, without giving the Head of the Department an opportunity to right the alleged wrong before it has grown into a big claim against the public funds. And the fact that the inferior agent on the job does not act in good faith does not make it less necessary that his superiors, who presumably would deal fairly with the contractor, should have an opportunity to pass upon the dispute. *Fitzgibbons* v. *U. S.*, 52 C. Cls. 164. See also *Silas Mason* v. *U. S.*, 90 C. Cls. 266.

If a contractor concludes, as plaintiff apparently did, that he can get along better, on the whole, by pursuing a policy of appeasement of the Superintendent on the job, than by asserting and insisting upon his rights, he should not expect the Government to pay him the cost of the policy which he elected to follow.

HOWARD C. MYERS v. THE UNITED STATES
No. 43671

JOHN H. ARBLE v. THE UNITED STATES
No. 43672

CHARLES C. MARTIN v. THE UNITED STATES
No. 43673

WALTER O. PLITZ v. THE UNITED STATES
No. 43674

GEORGE H. SPITZ v. THE UNITED STATES
No. 43675

[Decided February 1, 1943. Defendant's motions for new trial overruled April 5, 1943]*

On the Proofs

Extra pay for overtime; customs employees.—It is *held* that the plaintiffs, customs inspectors at the port of Detroit from September 1, 1931, to August 31, 1937, are entitled to extra compensation as fixed by section 5 of the Act of 1911, as amended by the Act of 1920, for services performed between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, or on Sundays or holidays, and the Government is liable for such extra compensation.

Same; meaning of "overtime" under the statute.—Where the statute plainly states that the services rendered after 5 o'clock in the afternoon and before 8 o'clock in the morning or on Sundays and holidays shall be "overtime," no other meaning can be given to the term "overtime."

Same; liability of the Government.—Where the statute provides that extra compensation due to customs employees for overtime work at night or on Sundays or holidays shall be paid to the collector of customs by the owner, master or consignee of such vessel to which a special license or permit is granted for lading or unlading at night or on Sunday or holidays; it is *held* that such provision does not relieve the Government from liability for extra pay for services during the periods fixed under statute.

*Petition for writ of certiorari granted October 11, 1943.

Reporter's Statement of the Case

Same; authority of customs collector.—Where the statute gives to the collector of customs authority to adjust the working day of customs employees to correspond with the customary daylight working periods at certain ports, it is *held* that such provision granting such authority does not affect or alter the length of the working day for customs employees or the overtime pay fixed by the statute.

Same.—There is no difference in purpose, as a means of conveyance of persons, baggage or freight from one side of a river to another, between a ferry, a bridge and a tunnel.

Same.—In the Tariff Act of 1930, the word "vehicle" includes "every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land but does not include aircraft." (46 Stat. 708.)

The Reporter's statement of the case:

Mr. Robert M. Drysdale for the plaintiffs.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Sidney J. Kaplan* was on the briefs.

In these cases an opinion was filed January 6, 1941, deciding that the respective plaintiffs were entitled to recover, and entry of judgment was suspended to await the filing of a stipulation by the parties or the taking of proof as to the amount of extra compensation due plaintiffs in accordance with said opinion. (92 C. Cls. 447.)

Defendant's motion for a new trial was overruled March 12, 1941.

On October 17, 1941, on the court's own motion, it was ordered "that the special findings of fact, the conclusion of law and opinion filed herein January 6, 1941, be and the same are vacated, and withdrawn," and the case was remanded to the trial calendar for oral argument *ab initio*. (94 C. Cls. 712.)

On February 1, 1943, the court filed findings of fact, conclusion of law and opinions as follows:

1. Each of the plaintiffs is a citizen of the United States and resident of the State of Michigan.

2. Each of the plaintiffs was a customs inspector at the port of Detroit September 1, 1931, to August 31, 1937, dur-

ing which period the base salary of an inspector was $2,100 per annum, which, except as diminished by the Economy Act of June 30, 1932, 47 Stat. 382, he has received.

3. At the port of Detroit, there were at all times herein involved the following stations where customs inspectors rendered services with respect to goods, merchandise, passengers and baggage arriving and departing on, over, or under the Detroit river, to wit:

Detroit and Windsor Ferry
Walkerville Ferry
Detroit and Canada Tunnel
Ambassador Bridge
Michigan Central Tunnel
Wabash Railway Ferries
Pere Marquette Railway Ferries
Grand Trunk Railway Slip Dock

At all times herein involved the Detroit and Windsor Ferry was an international line of ferry boats operating between Windsor, Ontario, Canada, and Detroit, Michigan, continuously from 5 a. m. until 2 a. m. of the following day. Services rendered by customs inspectors at this station consisted of inspection of pedestrians and vehicular traffic, commercial busses, and commercial importations arriving from Canada; inspection of merchandise brought in by pedestrians, automobile or truck, including passengers' baggage; examination of goods entering in bond for transportation through the United States and of goods for exportation to foreign countries, with benefit of drawback or otherwise.

The Walkerville Ferry was an international line of ferry boats operating daily from 5:30 a. m. to 2 a. m. of the following day between Walkerville, Ontario, and the port of Detroit. Inspectors performed services at this station identical with those performed at the Detroit and Windsor Ferry station with the exception that no commercial busses crossed on the Walkerville Ferry boats.

The Detroit and Canada Tunnel, opened to traffic November 3, 1930, was a tube under the Detroit River connecting Windsor and Detroit, through which passed vehicular traffic carrying passengers and merchandise. Services by inspec-

tors included all those performed at the Walkerville Ferry station and in addition thereto inspection of passengers and their baggage carried by a line of commercial busses operated through the tunnel by the Detroit and Canada Tunnel Company. The tunnel never closed and traffic through it was continuous twenty-four hours per day.

The Ambassador Bridge, opened to traffic November 15, 1929, was a bridge over the Detroit River connecting Sandwich, Ontario, and Detroit. Traffic was continuous for twenty-four hours per day and included foot passengers, vehicular traffic, commercial trucks and busses. Services performed by customs inspectors were identical with those performed at the Detroit and Windsor Ferry station.

The Michigan Central Tunnel was a tube connecting Windsor and Detroit, owned by the Michigan Central Railway, through which the railway company operated its trains, both passenger and freight. Traffic here was continuous for twenty-four hours per day. Customs services at this place were performed at the passenger station and at the freight yard, services rendered by customs inspectors at the latter being in connection with the lading and unlading of merchandise for purposes of inspection, in connection with the transportation and exportation in bond, exportation with benefit of drawback, and the examination of in-transit and other seals. At the passenger station services consisted of examination of passengers' baggage and merchandise and the lading and unlading of merchandise from passenger trains for purposes of inspection.

The Wabash Railway Ferries and the Pere Marquette Railway Ferries were lines of international railway car ferries, owned by the respective railway companies named. carrying freight cars exclusively except for a period in the beginning of the time herein involved when passenger cars were brought in on the Wabash Railway Ferries. Services here performed by customs inspectors were identical with those performed in the freight yard of the Michigan Central Railway.

The Grand Trunk Railway Slip Dock was the terminal for railway ferry boats carrying passenger and freight cars

to and from Windsor on the Grand Trunk Railway Line. Services performed were identical with those rendered at the passenger station and the freight yard of the Michigan Central Railway.

Channels of transportation other than the Ambassador Bridge and the Detroit and Canada Tunnel had been in operation for years prior to November 15, 1929.

4. As used in these findings the word "nighttime" refers to the period 5 o'clock p. m. of any day to 8 o'clock a. m. of the next day, and the word "daytime" to the period 8 o'clock a. m. of any day to 5 o'clock p. m. of the same day. "Excess pay" refers to pay in excess of the inspector's annual salary. The word "week-day" refers to any day of the week other than Sundays or whole holidays, and the word "holiday" refers to a holiday of not less than 24 hours.

5. Before the opening of the Ambassador Bridge November 15, 1929, all customs inspectors at the port of Detroit were regularly assigned to eight-hour tours of duty, which might be any period of that length within the 24 hours of any day of the week, including Sundays and holidays. They did not receive for nighttime services performed on such tours weekdays, Sundays, or holidays, any excess pay, but they did receive excess pay for daytime service so performed on Sundays or holidays. The inspectors had an eight-hour day and a 56-hour week.

This practice, however, did not wholly prevail at the Michigan Central Railway, where for certain periods prior to November 15, 1929, excess pay was not allowed for daytime service on Sundays or holidays.

6. Upon the opening of the Ambassador Bridge November 15, 1929, there was a change in practice at the port of Detroit.

At the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge, and the freight yard of the Michigan Central Railway, the customs inspectors were given an eight-hour day and a 48-hour week. Excess pay was discontinued for daytime service performed on Sundays or holidays, within the 48-hour week. No excess pay was given for nighttime service per-

formed Sundays, holidays, or weekdays, within the 48-hour week.

At the Michigan Central Railway passenger station and the Wabash Railway and Pere Marquette Railway ferries, and the Grand Trunk Railway Slip Dock the hours continued as before, with an eight-hour day and a 56-hour week. Excess pay was continued at these last four places for daytime service performed on Sundays and holidays, even though within the 56-hour limit, but no excess pay was given for nighttime service there on Sundays, holidays, or weekdays, performed within the 56-hour period.

After March 3, 1931, the date of going into effect of the Saturday half-holiday for Federal employees, the hours of employment per week were reduced to 44 at the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge and the freight yard of the Michigan Central Railway, and to 52 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries, and at the Grand Trunk Railway Slip Dock, with conditions of excess pay as before but within and based upon the new period of 44 hours. Pay in excess of their annual salaries was given to inspectors for time served in excess of 44 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock notwithstanding the 52-hour week.

During the period for which claims are being made, viz, September 1, 1931, to August 31, 1937, excess pay given to the inspectors had first been collected by the Collector of Customs from the carrier concerned, and by the Collector remitted to the inspectors by check on the fund so collected. The carriers, so collected from, filed bond securing such collections, under a permit which was given to them by the Collector on application for the service desired.

Whether and in what amount under the bond and permit system moneys should be collected from the carrier concerned for the payment of compensation to the inspectors

was determined by their official superiors, and was not within the control of the inspectors.

7. Plaintiffs' claims are confined (1) to service performed at nighttime on weekdays, Sundays, and holidays, and (2) to service performed in the daytime on Sundays and holidays, in both instances within a regular tour of duty of 44 hours per week.

All service was performed in line of duty, as assigned and directed by their superiors, and all payments of excess pay were made on vouchers prepared at the direction of the inspectors' superiors in office and given to the inspectors for them to sign before payment.

8. *Howard C. Myers*, No. 43671.—Plaintiff Howard C. Myers was appointed inspector in the customs service May 28, 1930, and for the period September 1, 1931, to August 31, 1937, performed certain services at the Detroit port in daytime on Sundays or holidays, or at nighttime on Sundays, holidays, or weekdays that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100 is $13,759.41, which the plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $6,469.93, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $13,759.41.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed service in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries, for which he received $691.76 excess pay.

The regular tour of duty at these stations was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the carriers concerned.

This item of $691.76 is not sued for herein.

9. *John H. Arble*, No. 43672.—Plaintiff John H. Arble received appointment in the customs service July 1, 1930, and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays, or at nightime on Sundays, holidays, or weekdays, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $10,219.23, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays, wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $4,972.76, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $10,219.23.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Grand Trunk Railway Slip Dock for which he received $124.20 excess pay.

The regular tour of duty at this dock was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Grand Trunk Railway.

This item of $124.20 is not sued for herein.

10. *Charles C. Martin*, No. 43673.—Plaintiff Charles C. Martin received appointment into the customs service November 4, 1929, and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $12,225.32, which the plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work

in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $5,650.44, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $12,225.32.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries and the Grand Trunk Railway Slip Dock for which he received $888.50 excess pay.

The regular tour of duty at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Wabash Railway, Pere Marquette Railway, and Grand Trunk Railway.

This item of $888.50 is not sued for herein.

During the period of this claim plaintiff Charles C. Martin also performed services in excess of 44 hours per week at the Detroit and Windsor Ferry for which he received $45.77 excess pay.

The regular tour of duty at this station was 44 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Detroit and Windsor Ferry.

This item of $45.77 is not sued for herein.

11. *Walter O. Plitz*, No. 43674.—Plaintiff Walter O. Plitz received appointment into the customs service October 20, 1930, and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $12,277.94, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays,

or weekdays, is $5,833.55, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $12,277.94.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Pere Marquette Railway and Wabash Railway ferries, for which he received $442.78 excess pay.

The regular tour of duty at the Pere Marquette Railway and Wabash Railway ferries was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Pere Marquette Railway and the Wabash Railway.

This item of $442.78 is not sued for herein.

12. *George H. Spitz*, No. 43675.—Plaintiff George H. Spitz received his appointment into the customs service in November of 1929 and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $10,267.68, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays, holidays, or at nighttime on Sundays, holidays, or weekdays, is $4,759.52, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $10,267.68.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries, for which he received $399.13 excess pay.

The regular tour of duty at the Wabash Railway and Pere Marquette Railway ferries was 52 hours per week. The

excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Pere Marquette Railway and Wabash Railway.

This item of $399.13 is not sued for herein.

During the period of this claim plaintiff also performed services in excess of 44 hours per week at the Michigan Central Railway Freight Yard or Passenger Station, for which he received $346.92 excess pay.

The regular tour of duty at the freight yard was 44 hours per week, at the passenger station 52 hours per week. It does not appear how the services were divided, if at all, between these two places. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Michigan Central Railway.

This item of $346.92 is not sued for herein.

13. The amounts sued for herein by the respective plaintiffs have not been collected in whole or in part from the several carriers concerned by plaintiffs or defendant.

The court decided that plaintiff Howard C. Myers was entitled to recover $13,759.41; plaintiff John H. Arble, $10,219.23; plaintiff Charles C. Martin, $12,225.32; plaintiff Walter O. Plitz, $12,277.94; and plaintiff George H. Spitz, $10,267.68.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The sole question in these cases is the liability of the United States for extra compensation for services rendered at night, on Sundays or holidays by customs inspectors at the port of Detroit, Michigan. No claim is made for extra pay for any work other than the regular tours of service of eight hours during the twenty-four hours of any day. The parties have stipulated that the five cases in suit [Nos. 43671, 43672, 43673, 43674, and 43675] shall serve as test cases for the determination of twenty-two other suits by customs inspectors at the port of Detroit to recover extra compensation.

Plaintiffs' claims are based on section 5 of the act of February 13, 1911, 36 Stat. 899, 901, as amended by the act of February 7, 1920, 41 Stat. 402, and sections 450, 451, 452,

and 401 of the Tariff Act of 1930, 46 Stat. 590, 715. (U. S. Code, Title 19, section 267.)

The solution of the question involves an interpretation of the section of the Act of 1911, as amended, which reads as follows:

> SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee

of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees on the overtime pay herein fixed.

The plaintiffs performed services at night, or on Sundays or holidays, at the port of Detroit where goods, merchandise, passengers, and baggage arrived from or entered Canada on, over, and under the Detroit River by way of ferries, tunnels, and a bridge.

Extra compensation is claimed for night services at all stations and for Sunday or holiday services at the ferries, tunnels, and bridge.

At one of the tunnels extra compensation was paid for Sunday or holiday services. Plaintiffs performed at all the stations herein involved services at night, or on Sundays or holidays, in connection with the lading and unlading of cargo, or the lading of cargo or merchandise for transportation in bond, or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage. Only eight-hour periods of the twenty-four hours of any day, including Sundays or holidays, were performed. There is no claim made for any excess of time over eight hours.

Before November 15, 1929, when the Ambassador Bridge was opened, customs officers and employees at the port of Detroit were paid at all stations extra compensation for Sunday or holiday services. After the opening of the Bridge the collector of customs stopped payment of extra compensation for Sunday or holiday services at the ferries and tunnels and substituted therefor the practice of giving compensatory time off at a later date. No extra compensation for Sunday or holiday duty was made at the Ambassador Bridge or the Detroit and Canada Tunnel but compensatory time off was granted.

There is no difference between a ferry, a bridge, and a tunnel as a means of conveyance of persons, baggage, or freight from one side of a river to another. All accomplish the same purpose. The Tariff Act of 1930, Sec. 401, 46 Stat. 708, defines a vehicle in the following language:

> The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportaion on land, but does not include aircraft.

This is a very broad and comprehensive definition. It was necessary to have inspectors of Customs at these bridges and tunnels during the hours they were open for use just as much as it was necessary to have them upon arrival of ferries or vessels. Dutiable articles could be brought in over the bridges and tunnels just as well as by vessel. Persons entering the country could come in over these fixed structures just as easy as by ship. These structures had to be guarded and the articles inspected. It was encumbent upon the defendant to furnish the inspectors whether the bridges and tunnels were privately or publicly owned. A bond could have been required and exacted by the Government to pay for the extra time service.

Section 5 of the act of 1911, as amended by the act of 1920, is not ambiguous but plain and clear. It not only provides extra compensation for overtime services of customs officers and employees who are required to perform services after five o'clock P. M. and before eight o'clock A. M. (defined in the act as "night" service) or Sundays or holidays but it definitely states the basis of the compensation of those who work between five o'clock postmeridian and eight o'clock antemeridian not to exceed two and one-half days' full pay and for the services on Sundays or holidays not to exceed two additional days' pay.

Plaintiffs were on a yearly salary of $2,100 and were on duty after five o'clock postmeridian and before eight o'clock antemeridian or on Sundays or holidays.

It is contended that overtime means only "extension of work hours above eight hours in twenty-four" but there is nothing in the act to this effect. On the contrary, the act plainly states that the services rendered after five o'clock in

the afternoon and before eight o'clock in the morning or on Sundays or holidays shall be "overtime."

In *Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 Fed. (2d) 489, 492, in considering the provisions of section 5, the court held:

> * * * The term "overtime" appropriately expresses the meaning, and in my opinion was intended to express such meaning: "Beyond the regular, fixed working hours." The word "remain," in the clause referring to officers required to "remain on duty between the hours" mentioned, means, according to its proper interpretation, "remain on duty after reporting for such duty." The section itself provides that "such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual" work contemplated "takes place or not." As was pointed out by the Supreme Court in its opinion in *International Railway Co.* v. *Davidson*, 257 U. S. 506, 42 S. Ct. 179, 66 L. Ed. 341: "This * * * section defines what shall be deemed overtime." The only definition thus employed was the reference to the period of time between the particular hours specified, without regard to the question whether the services rendered "at night" or "on Sundays or holidays" immediately and continuously followed services just completed for regular pay. Clearly, the object of the statute was to facilitate lading and unlading "at night" and on Sundays and holidays, irrespective of whether the officers working in connection therewith had previously worked during the regular hours of the immediately preceding regular working "day."

It is contended by the defendant that the portion of the section which reads:

> * * * The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury * * *

imposes the liability on the carrier and that, unless work is performed under a special license granted by the collector, no extra compensation accrues and nothing can be paid.

Section 451 of the Tariff Act of 1930, 46 Stat. 715, requires that before a special license to unlade can be granted to the master, owner, or agent, a bond in the penal sum to be fixed by the collector be given "conditioned to indemnify the United States for any loss or liability" which might occur. Section 452 of the same act requires a special license to lade at night or on Sundays or holidays.

The bond required is to "indemnify" the United States for the extra compensation which has to be paid the customs officers and employees who perform duties for which the license is given and which required the services to be rendered at night or on Sundays or holidays.

These customs officers and employees were employed by and received their compensation from the collector acting for the United States. Under the act of March 3, 1917, c. 163, § 1, 39 Stat. 1106, they could not receive their pay for services from any private source. Customs officials especially are forbidden to receive such payment. Revised Statutes, § 1790. Payment had to be made by the Government through the collector and the extra compensation to the inspectors had to come out of the funds of the Government and the Government was liable for the extra compensation. The failure by the Government to collect from the carrier would not relieve it of liability for the extra pay for services during the periods under the statute.

It is contended by the defendant that the proviso of this section gives the collector full authority to require customs officers and employees to work at night or on Sundays or holidays without extra compensation. The proviso reads as follows:

> *Provided further*, That in those ports where customary working hours are other than these hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

It will be seen that the latter part of the proviso prohibits alteration of the length of a working day of customs employees or overtime pay fixed in the statute. The plain in-

tent of the proviso is to permit collectors of customs at ports where longshoremen and others are accustomed to begin work earlier or later than the hour fixed by the section, to adjust the customs employees' working day to correspond with the customary daylight working period at a certain designated port. In other words, the collector could allow the inspectors to work from 7:00 A. M. to 4:00 P. M. instead of from 8:00 A. M. to 5:00 P. M. because at a particular port it was the custom of the longshoremen to work these particular hours. It specifically states that this arrangement to a custom of a port shall not affect or alter the length of a working day for customs employees or the overtime pay fixed therein.

We do not think it necessary to go into an extensive discussion of the contention of the defendant that Congress gave legislative approval to the system of compensation and working hours adopted by the collector of customs at the port of Detroit by the passage of the Appropriation and Tariff Acts of 1922 and 1930 and by the insertion at the end of section 451 of the Act of 1938, 52 Stat. 1082, of the following provision:

> Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign Customs officers or employees to regular tours of duty at night or on Sundays or holidays when such assignments are in the public interest, * * *

There is no denial of the fact that the Treasury Department has the right to assign the customs officers and employees to regular hours of duty during any eight-hour period of the twenty-four hours of a day. However, there is nothing under this provision which restricts or qualifies the right of the customs officers and employees to extra compensation as provided by law for services rendered at night, or on Sundays or holidays.

It is our conclusion that plaintiffs have the right to extra compensation as fixed by section 5 of the Act of 1911, as amended by the act of 1920, for services performed between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, and the defendant is liable for such extra compensation. This is in addition to the base pay which plaintiffs have been paid.

This court can only construe the statute as it is written by the lawmaking body. It cannot indulge in judicial legislation. If the amounts granted as overtime are apparently excessive as compared with those allowed in other occupations, Congress alone can apply the remedy.

Plaintiffs are entitled to recover as follows:

No. 43671. *Howard C. Myers*	$13, 759. 41
No. 43672. *John H. Arble*	10, 219. 23
No. 43673. *Charles C. Martin*	12, 225. 32
No. 43674. *Walter O. Plitz*	12, 277. 94
No. 43675. *George H. Spitz*	10, 267.68

It is so ordered.

JONES, *Judge:* and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

MADDEN, *Judge*, concurring in part and dissenting in part:

I agree with the opinion of the court that the word "overtime," as used in the applicable statute, means, contrary to its ordinary meaning, work done outside the hours mentioned in the statute, and on Sundays and holidays, even though some or all of the time so designated as "overtime" falls within the regular daily or weekly working period of the employee who claims extra pay for the "overtime." It follows that so much of the work as is really covered by the statute must be paid for at the statutory rate. I agree also that the Government's failure to collect the amount of its extra expense from the railroads and ferry companies is no answer to the demand of plaintiffs that they be paid the statutory compensation. I disagree, however, with the application of the statute relating to extra compensation to the customs employees at the Ambassador Bridge and the Detroit and Canada Tunnel, and think that the judgments should be reduced to whatever extent they include extra compensation for such services.

The language of the statute, Section 5 of the act of February 13, 1911 (36 Stat. 901), as amended by the act of February 7, 1920 (41 Stat. 402; 19 U. S. C. 267), which is made a part of the Tariff Act of 1930 by reference, shows that

the extra compensation to be paid to customs' employees was to be collectible from those who used the extra service. The statute says: "The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees * * *."

The legislative history of the statute is to the same effect. At the hearings before the Committee on Ways and Means on H. R. 9525 (61st Congress, 2nd Sess.), the companion bill of S. 6011, which became the act of February 13, 1911, several colloquies occurred, in each of which assurance was given that the statute was to be administered without cost to the Government. See pages 462, 463, 464, 470 of the hearings. The Report of the Committee on Ways and Means on S. 6011 recommended passage with the following amendment: "the said extra compensation to be paid by the master, owner, agent, or consignee of such vessels." The amendment was adopted.

Plaintiffs do not urge that the 1920 amendment of the act of 1911 changed the meaning of the act in this respect. They urge rather that all of the extra compensation for which they sue has been collectible from the users of the service, and that the Government has, by its own negligence, failed to collect the extra compensation from the users of the service, though it has had the legal right to collect it. In effect, then, we are asked by plaintiffs to decide not only that customs employees who rendered the services which they rendered, are entitled to collect extra compensation from the Government at the rate fixed in Section 5, but that the users of such services should have, in the past, and should in the future, apply for and take out a special license or permit pursuant to Section 451 of the Tariff Act of 1930 (46 Stat. 708, 715; 19 U. S. C. 1451), giving bond to indemnify the United States for any loss or liability which might result from the special license or permit, and to pay the extra compensation to the employees.

Among the services sued for by plaintiffs were those at the Ambassador Bridge, which spanned the Detroit River, connecting Detroit and Sandwich, Ontario. We have found that over this bridge "Traffic was continuous for twenty-four hours per day and included foot passengers, vehicular traffic, commercial trucks and busses." In my opinion, the statutes do not require the Government to impose upon a pedestrian who walks across the bridge between five o'clock in the afternoon and eight o'clock in the morning, the duty of applying for a permit and giving a bond to pay the extra compensation of customs employees. The pedestrian might well point to the statute, which speaks of a "vessel or vehicle" (Tariff Act of 1930, Section 451, 46 Stat. 708, 715), and urge that even the broad definition of vehicle which appears in Section 401 of that act does not include his means of locomotion. Private automobiles also cross the bridge. I do not believe that Congress intended that each person who drives his automobile or truck across the bridge should have to apply for a permit or license and give a bond to pay for his small portion of extra compensation of customs employees.

Plaintiffs, apparently recognizing that such a construction of the statutes would, in effect, close the bridge to private traffic from five o'clock in the afternoon until eight o'clock in the morning, and largely destroy its usefulness, do not urge that this burden should be imposed upon such users. They urge rather that the owner of the bridge should be the one who should apply for the permit, give the bond, and pay for the extra compensation of the customs employees. This would be a less inconvenient solution of the problem, but the statutes do not seem to me to permit it. Section 401 (b) of the Tariff Act of 1930 defines a vehicle, for the purpose here in question, as follows:

> The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

I do not think a bridge is a vehicle, within either the ordinary or this statutory definition of that word, any more than a road is a vehicle. Since the duty is imposed upon the

"master, owner, or agent, of such vessel or vehicle" (Tariff Act of 1930, Sec. 451, 46 Stat. 708, 715), it does not fall upon the owner of the bridge, unless, as plaintiff urges, as an agent of the customers of his bridge. In the case of the pedestrians, we need not inquire into the question of agency, since no vehicle is involved at all whose owner might be represented by an agent. In the case of the private automobile or truck, I do not see how the collection of a bridge toll from its owner or driver constitutes the owner of the bridge the agent of the owner or driver with reference to customs, if any, collectible upon his load or baggage, if any. Plaintiff urges that the provisions of Section 453 of the Tariff Act of 1930 (46 Stat. 708, 716), imposing a penalty for unlading without a special permit upon, *inter alia*, "every other person who knowingly is concerned, or who aids therein," of the value of the merchandise or baggage, and, in some cases, of the forfeiture of the vessel or vehicle, make the owner of the bridge an agent of his customer for the purposes of obtaining a special license and giving bond. This section does not, by imposing a penalty upon one who comes within its definition, make such a person the agent of another for the purpose of applying for a license or giving a bond for him. Besides, one who permits another to walk across his toll bridge, or drive his automobile across it, is not "knowingly concerned" with the others unlading a vehicle without a license, when the other has no vehicle, or if he has one, it is no concern of the bridge owner whether he has or has not anything in it to unlade.

I would conclude from the foregoing that, with reference to what is probably the larger part of the traffic across the Ambassador Bridge, the statutes here in question have no bearing upon it. If the customs authorities are willing to permit entry of such traffic into the United States at this point during any hour of the day, they may do so, but the statutes, in my opinion, give them no power to impose special requirements upon such users of the bridge. And I have grave doubts as to whether they have the power to impose such requirements upon public busses and trucks, since the port is not kept open for their convenience and no extra expense is usually incurred in order to serve them. Certainly

the whole of the cost, outside the hours from 8 A. M. to 5 P. M., could not be imposed upon the few public conveyances that might enter during that time, when in fact the entry is kept open for public convenience to accommodate the much greater number of other persons to whom the statutes relating to special licenses and bonds and payment of extra compensation have, as I think, no application.

What I have said about the Ambassador Bridge is applicable also to the Detroit and Canada Tunnel. A tunnel is not a vehicle and the statute relating to extra compensation does not, I think, apply to it.

If, by what I regard as a strained construction of the word "vehicle," or the word "agent," as used in the statutes, we hold that the Government may collect from the Bridge Company or the Tunnel Company, and therefore must pay its customs employees extra compensation, we have still found no solution for the numerous points of entry where the access to the border is over a free public road. Then there would be no person to whom, by any stretch of interpretation, the extra compensation could be shifted, hence extra compensation would not be payable.

In my opinion, the applicable statute is not one which should receive a strained construction in order to permit plaintiffs to recover. The public inconvenience of either closing these facilities except for a few hours in the daytime, or else imposing the whole expense of keeping them open upon only a few of those who are accommodated by their being kept open, would be great. As to keeping these facilities open at the public expense, without reimbursement from the users, and paying the employees who work their regular eight hour shift or a part of it, at some time between five P. M. and eight A. M. at the rate of three days pay for one eight hour day's work, or three hours pay for one hour's work, no one contends, I believe, that there is any warrant in the statutes for that. That scale of extra compensation is provided for only in statutes which provide for its reimbursement by the users of the service, and the legislative history shows that it was not intended to be paid when the Government could not recover it. Aside from this section, there is nothing in the statutes to indicate that customs employees are

regarded by Congress as being in a different class from other employees of the Government, such as postal employees, who must do their regular day's work at such time of day as the work is needed. It is of interest to note that Congress has provided for extra pay of 10 percent of the regular hourly rate for certain postal employees for work done between six P. M. and six A. M.[1] It could hardly be supposed that Congress intended that for another class of employees the extra pay, payable out of the public treasury, and without reimbursement to the Government, should be 200 percent instead of 10 percent, for working during the less desirable hours.

THE NATIONAL PIPE LINE COMPANY v. THE UNITED STATES

[No. 43658. Decided February 1, 1943. Plaintiff's motion for new trial overruled May 3, 1943]

On the Proofs

Tax on transportation of oil by pipe line; transportation of oil for parent company only; basis of tax.—Plaintiff, operating an oil pipe line serving only its parent company and having no published tariffs, was liable under section 731 of the Revenue Act of 1932 for the tax on the transportation of oil by pipe line on the basis of the charge for such service as set forth in subdivision (b), clause (2) of said section, which provides that if no bona fide rates are charged by such pipe line the tax shall be determined "on the basis of the actual bona fide rates or tariffs of other pipe lines for like services, as determined by the Commissioner" (47 Stat. 169, 275).

Same; "like services" under section 731 of the 1932 Revenue Act.—Where the Commissioner held that plaintiff's services and the services rendered by other pipe line companies in their respective areas were "like services" within the meaning of clause (2) of subdivision (b) of section 731, Revenue Act of 1932; and where it is shown that said other pipe line companies in the neighborhood where plaintiff operated performed for their customers the exact services which plaintiff performed, if those were the services their customers called for; it is *held* that the determination of the Commissioner was reasonable and plaintiff is not entitled to recover.

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[1] Act of May 24, 1928, C. 725, 45 Stat. 725, as amended May 12, 1939, C. 129, 53 Stat. 741, 39 U. S. C. 828.

Same; determination by Commissioner.—Under the statute (47 Stat. 169, 275) the question for the Commissioner was not whether, under the provisions of clause (3) of subdivision (b) of Section 731, the charges of certain other pipe line companies were reasonable for the kind of services rendered by plaintiff; but the question was whether said companies did, at arm's length, charge such rates for services "like" those of plaintiff, as provided in clause (2) of subdivision (b); and the Commissioner's inquiry ended there.

Same.—The Commissioner did not exceed his power in determining that the services of other pipe line companies were "like services" to those of plaintiff and that plaintiff's tax should be computed on the rates so charged by said companies.

The Reporter's statement of the case:

Mr. Meredith M. Daubin for the plaintiff. *Mr. Homer L. McCormick* was on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Plaintiff, a wholly owned subsidiary of the National Refining Company, was engaged in the business of gathering crude petroleum oil from producing wells only for its parent company and delivering such oil by pipe line to two nearby refineries owned by its parent company. Plaintiff was not a common carrier and had no published tariffs on file with the Interstate Commerce Commission or other regulatory body; made no charge to its parent company for such service; had no trunk line connections with any other pipe line company and had no storage tanks nor tank farms.

The court held that for the period from June 20, 1932, to February 29, 1936, plaintiff under Section 731 of the Revenue Act of 1932, was liable for the tax on the transportation of oil by pipe line.

The court made special findings of fact as follows:

1. Plaintiff was an Ohio corporation which was dissolved December 12, 1936, in accordance with Section 84, Chapter 31, of the West Virginia Code, 1931. It was a wholly owned subsidiary of the National Refining Company, hereinafter sometimes referred to as the "parent company," a corporation engaged in the business of refining and marketing

petroleum and its products. During the period from 1932 to 1936 plaintiff's offices and office employees were the same as those of the National Refining Company.

2. During the years 1932 to 1936 and prior thereto, plaintiff was engaged in the business of gathering crude petroleum oil from producing wells for its parent company and delivering the oil by pipe line to the two refineries of the parent company at Findlay and Marietta, Ohio.

3. Plaintiff was not a common carrier and had no published tariffs with the Interstate Commerce Commission or other regulatory bodies. It gathered oil only for its parent company from producers' field tanks located at or near producing oil wells in the areas served by its pipe lines and delivered the oil to its parent's refineries heretofore referred to. It made no charge for its service. It had no trunk line connections with any other pipe-line company and had no storage tanks or tank farms.

4. Between June 20, 1932, and February 29, 1936 (hereinafter sometimes referred to as the "period of the claims involved in this action"), plaintiff gathered for its parent company and delivered to its parent's refineries the following amounts of crude petroleum oil:

Year	For Findlay Refinery	For Marietta Refinery
	Barrels	*Barrels*
From June 20, 1932	67,234.84	60,432.54
1933	218,220.58	98,511.76
1934	220,044.86	82,290.50
1935	203,845.87	79,921.35
To Feb. 29, 1936	14,435.61	12,133.32

5. In compliance with the provisions of Section 731 of the Revenue Act of 1932, plaintiff filed monthly excise tax returns and computed the tax on the oil gathered and delivered to the Findlay and Marietta refineries, as shown in the preceding finding, at the respective rates of 17 and 21 cents per barrel, which were the rates which had been used by the Commissioner of Internal Revenue in determining plaintiff's tax liability for similar services under Section 500 of the Revenue Act of 1918 for the years 1918 to 1921, inclusive. Taxes were duly assessed against plaintiff at the foregoing rates, and were paid by it.

6. October 30, 1934, the Commissioner advised plaintiff in part as follows:

> Since your company does not have any bona fide rates or tariffs, this office in determining the fair charge for the services performed by your company must first resort to the second provision of the law quoted above [Section 731 (b), Revenue Act of 1932]. Upon investigation it is found that the customary charge for services such as are performed by your company in the Findlay area, Ohio, is 31.26 cents per barrel. It is therefore held that the rate of 31.26 cents which appears in the local tariffs published by the Buckeye Pipe Line Company, P. U. C. Ohio Nos. 55 and 56, is the fair charge for your pipe-line services in the Findlay area, Ohio. Your attention is called to the fact that this is the lowest rate published by the Buckeye Pipe Line Company for like services in the Lima division, Ohio, which includes the Findlay area, during the period June 21, 1932, to July 31, 1933.
>
> With respect to your Ohio-West Virginia system where the greater part of your lines are located in West Virginia, crossing the Ohio River into Ohio, the rates established by the Eureka Pipe Line Company for like services of 30 cents per barrel from June 21, 1932, to August 10, 1932, inclusive, and 31.26 cents per barrel for the period beginning August 11, 1932, are properly applicable for tax purposes. The additional rate of 6¼ cents per barrel recommended by the agents for the pipe-line service across the Ohio River is not considered applicable to this case and has been eliminated.
>
> The additional tax of $1,495.07 for the period June 21, 1932, to July 31, 1933, inclusive, will be assessed, with the interest due thereon, on the basis of the rates appearing in this letter.
>
> It is understood that the determination of the above rates removes any dispute as to the reasonableness of such rates for the period covered by this letter, but that other questions, including the taxability as such of the movements or the constitutionality of the statute by which the tax is imposed, may be prosecuted by claim for refund, suit, or otherwise.

The rates used by the Commissioner were fixed, as shown above, on the basis of the tariff schedules of the Buckeye Pipe Line Company and the Eureka Pipe Line Company for what he held to be like services and no consideration was given either to plaintiff's return on investment or to tariff

schedules or rates applicable to other carriers outside the area where plaintiff operated.

7. Pursuant to the communication set out in the preceding finding, plaintiff paid the additional tax of $1,495.07 together with interest of $309.51 on December 7, 1934. The tax paid by plaintiff for the period June 20, 1932, to February 29, 1936, under the provisions of Section 731 of the Revenue Act of 1932 was in the net total amount of $13,518.20, the dates of payment being set out in a stipulation filed October 14, 1941.

8. July 1, 1936, plaintiff filed a claim for refund of $6,330.16 for the period beginning June 20, 1932, and ending February 29, 1936, inclusive, on the ground that the rates per barrel for the transportation of its oil as fixed by the Commissioner in his letter of October 30, 1934, and set out in finding 6, were excessive and did not constitute a fair charge for such transportation. The Commissioner rejected that claim July 30, 1937.

9. Plaintiff's pipe lines were located in Ohio and West Virginia and for convenience will be referred to as the Findlay Division and the Marietta Division. The former was in two counties of Ohio, Wood and Hancock; and the latter in Washington County, Ohio, and Wood, Ritchie, and Pleasants Counties, West Virginia. Title to the pipe lines in Ohio, both in the Findlay and Marietta Divisions, was in the National Refining Company, the parent company, and title to the lines in West Virginia was in plaintiff's name. The total length of plaintiff's pipe lines was 253 miles, of which approximately 132 miles were in the Findlay Division and approximately 120 miles in the Marietta Division, 83 miles of the latter being in West Virginia. Most of plaintiff's pipe lines were 2 inch lines, with some of 2½ and 3 inches, and approximately 3½ miles of 4 inch lines. The two divisions had field working tanks of a total capacity of about 4,400 barrels, the tanks being of a capacity of 300 to 500 barrels each, all of wooden construction except two which were of steel. There were three booster stations in the Findlay Division and seven in the Marietta Division, each being powered by gasoline engines. The distance from the most northern point of the Findlay Division to the most

southern point was twenty-seven miles with the refinery of the parent company located approximately one-third of the distance from the northern line. The average length of haul for oil gathered in both of plaintiff's fields was eight to nine miles per barrel.

10. The Buckeye Pipe Line Company, referred to in the communication from the Commissioner set out in finding 6, had two divisions, one known as the Lima and the other as the Macksburg Division, the former consisting of 1,470 miles and the latter of 3,419 miles. The Buckeye Pipe Line Company had an average haul of 55.08 miles per barrel in the Lima Division, and 66.64 miles per barrel in the Macksburg Division. Its facilities in the Lima Division covered fifteen counties and the approximate distance from the two most widely separated points was 124 miles. In that division its facilities were connected with approximately 2,000 producers' tanks and served approximately 11,400 wells. Its pipe lines were made up of approximately 716 miles of 2 inch pipes, 418 miles of 3 inch pipes, 183 miles of 4 inch pipes, 6 miles of 5 inch pipes, 100 miles of 6 inch pipes, and 53 miles of 8 inch pipes. Its buildings in that division consisted of 72 units and it had 1,200 pumping units with 10 stations. Its field storage tanks had a capacity of 200,000 barrels.

The Macksburg Division of the Buckeye Pipe Line Company covered twenty-seven counties in Ohio where it was connected with 6,296 producers' tanks and approximately 17,000 wells. Its lines were of 2, 3, 4, 5, and 6 inch pipes. It had 250 buildings, 16 boilers, 1,683 pumping units, and 127 field oil tanks with a storage capacity of 854,000 barrels.

11. The Eureka Pipe Line Company, likewise referred to in the Commissioner's letter set out in finding 6, had a pipe line system which operated in some twenty counties in the western part of West Virginia. Its pipe lines were approximately 4,000 miles in length and were connected with approximately 16,000 producing wells. The sizes of its pipe lines were 2, 3, 4, 6, and 8 inches. It made local deliveries at seven points within the area where it operated.

12. Plaintiff's Findlay Division was within the Lima Division of the Buckeye Pipe Line Company, the former covering a much smaller territory. The pipe lines of the two companies were intermingled and in some cases plaintiff's lines paralleled those of the Buckeye Pipe Line Company. The Buckeye Pipe Line Company had three delivery outlets in the Lima Division, namely, a refinery, a connecting pipe line, and a purchasing company which took the oil and stored it. The refinery was owned by plaintiff's parent company at Findlay, Ohio, and was the refinery to which plaintiff made the deliveries in its Findlay Division which are in controversy in this proceeding. The minimum rate of the Buckeye Pipe Line Company for gathering and delivering oil within its Lima Division from 1932 to 1936 was 31.26 cents per barrel regardless of the distance the oil was to be moved, and was the rate it charged for gathering and delivering oil during that period to the refineries of the National Refining Company at Findlay and Marietta, Ohio.

The part of plaintiff's Marietta Division which was in Ohio was within the Macksburg Division of the Buckeye Pipe Line Company though, as heretofore shown, the former covered a much smaller territory. The pipe lines of the two companies were intermingled and in some cases paralleled each other. The minimum rate of the Buckeye Pipe Line Company in the Macksburg Division for gathering oil and delivering it within the division was 31.26 cents per barrel during the period from 1932 to 1936, regardless of the distance it was required to move the oil. There was no difference in the gathering and delivery services rendered by the Buckeye Company in the Marietta (Macksburg) area and in the Findlay (Lima) area.

The part of plaintiff's Marietta Division which was in West Virginia was within the territory served by the Eureka Pipe Line Company, which company's minimum rate for gathering and delivering oil within the division was 30 cents per barrel from June 20, 1932, to August 10, 1932, and 31.26 cents per barrel from August 11, 1932, to February 29, 1936, regardless of distance. The services performed by the two companies in the gathering and delivering of oil within the area were substantially the same.

13. Both the Buckeye Pipe Line Company and the Eureka Pipe Line Company were common carriers which connected with common carriers operating and doing an interstate business. From June 20, 1932, to February 29, 1936, inclusive, the Buckeye Pipe Line Company published the tariff rate of 31.26 cents per barrel which was described for the Lima Division as a charge "For gathering Lima grade crude petroleum produced within the Lima Division in the State of Ohio and transporting same to delivery points for this grade of crude petroleum within the same Division in the State of Ohio." A like charge for a like service was published for the Macksburg Division.

During the period from June 20, 1932, to August 10, 1932, the Eureka Pipe Line Company published a rate of 30 cents per barrel, and from August 11, 1932, to February 29, 1936, a rate of 31.26 cents per barrel which rate was described in its tariff schedule as follows:

> The rate named in this tariff is for the transportation of Crude Petroleum Oil of a gravity exceeding thirty-five degrees Baumé (at sixty degrees Fahrenheit) by pipe lines, subject to the regulations named herein:
> From wells and tanks connected to the main gathering system of The Eureka Pipe Line Company in the State of West Virginia to tanks at Big Flint, W. Va., Downs, W. Va., Falling Rock, W. Va., Littleton, W. Va., Morgantown, W. Va., Parkersburg, W. Va., and St. Marys, W. Va., 31.26 cts. per barrel of 42 U. S. gallons.

In addition to the services performed by the Buckeye Pipe Line Company under the rates described above for its charges, that company provided storage facilities for which a charge was described as follows:

> The Buckeye Pipe Line Company, on the first of each month, will charge storage for the preceding month on all Crude Petroleum remaining in Production Account on the first day (7 A. M.) of each month, which was in its custody on the first day (7 A. M.) of the preceding month, at rate of $1.00 per 1,000 barrels per day.

Under this tariff it was possible for a shipper to receive a maximum of fifty-nine days' free storage and a minimum of

one day depending on the day on which the oil was delivered. When oil was placed in storage, the Buckeye Pipe Line Company issued credit balances which were marketable and the oil would be delivered to the producing owner or his consignee as ordered. This type of storage is sometimes referred to as an "oil bank." Neither the Eureka Pipe Line Company nor plaintiff provided storage facilities.

14. An analysis of plaintiff's operations for the period 1932 to 1936, inclusive, shows the following costs for services rendered by plaintiff in gathering oil and delivering it to the refineries of the National Refining Company, such costs being made up of items described as "repairs," "labor," "expense," "auto expense," "auto depreciation," "insurance," "taxes," and "depreciation":

Year	For the Findlay Refinery	For the Marietta Refinery	Total
1932	$19,640.87	$23,270.61	$42,911.48
1933	26,286.10	23,665.94	49,952.04
1934	29,122.48	18,238.22	47,360.70
1935	28,771.46	18,219.83	46,991.29
1936	21,305.69	16,934.49	38,240.18

During the period of the claim involved in this proceeding, plaintiff gathered oil and delivered it to its parent's refineries as shown in finding 4.

15. The pipe lines used in the operations involved in this proceeding were installed about 1900 to 1906 and, as shown in finding 9, the portion of the lines for both the Findlay and Marietta Divisions located in Ohio was owned by the National Refining Company and the portion located in West Virginia was owned by plaintiff. In 1936 the National Refining Company ceased using the Lima grade of oil for its Findlay refinery, and the pipe lines in that division were sold by the National Refining Company for junk. In 1939 the National Refining Company abandoned the use of its Marietta refinery, and the pipe lines in that division which were situated in Ohio were sold to the Buckeye Pipe Line Company and the lines in that division which were situated in West Virginia were sold to the Eureka Pipe Line Company and the Valvoline Oil Company.

16. The services rendered by plaintiff which are involved in this proceeding, whereby the oil was taken from producers' tanks at or near producing wells and transported through its pipe lines to a refinery within its division, are sometimes referred to in the oil industry as a "gathering service," as distinguished from what is sometimes referred to as a "transporting service," where oil which has been "gathered" previously is "transported" from a storage tank or farm, or the end of a stem or gathering line, to a further point of delivery which may involve connecting interstate carriers. Plaintiff was equipped to carry on, and did carry on, only the "gathering service" described above, but was not equipped to carry on, and did not carry on, the "transporting service" also described above. The former is usually carried on in 2, 3, and 4 inch pipes, whereas the latter is usually carried on in 6, 8, and 10 inch pipes largely because of the greater volume of oil moved in the latter situation. Common carriers treat the entire gathering service as inseparable, that is, while one charge may be set up in their tariff schedules for taking the oil from the tanks into the pipe lines and another for transporting the oil through the pipe lines to the point of delivery within the division, a total of the two charges is made.

17. The service rendered by the Buckeye Pipe Line Company in the Findlay Division for the National Refining Company in gathering oil and deliverying it to the latter's refinery for which it made a charge of 31.26 cents per barrel under its published tariff schedules was substantially the same at that rendered by plaintiff in gathering oil in the same division and delivering it to the same refinery. The distance within the division which the Buckeye Pipe Line Company was required to move the oil in transporting it from the producers' tanks to the refinery was not considered in determining the charge for the service. Separate charges were not made for taking the oil from the producers' tanks into the pipe line and for transporting the oil through the pipe line to the refinery. While the Buckeye Pipe Line Company had storage facilities available and connected with other common carriers doing an interstate business, as shown in finding 13, an additional charge was made for the use of

these additional storage facilities after the expiration of a period of free storage. These facilities and connections were not availed of in the service rendered by the Buckeye Pipe Line Company to the National Refining Company.

18. As heretofore shown, the Marietta Division of plaintiff was within the territory served by the Eureka Pipe Line Company. The services performed by these two companies within that division were substantially the same, and they were likewise substantially the same as the services described above as having been performed by the Buckeye Pipe Line Company for the National Refining Company in the Findlay Division. Neither plaintiff nor the Eureka Pipe Line Company had storage facilities, but the latter company connected with common carriers which did an interstate business, whereas plaintiff did not connect with common carriers and performed no interstate trunk line transportation.

19. The rates charged by the Buckeye Pipe Line Company of 31.26 cents per barrel for the period 1932 to 1936 in the Findlay Division and by the Eureka Pipe Line Company of 30 cents per barrel from June 20, 1932, to August 10, 1932, and of 31.26 cents per barrel from August 11, 1932, to February 29, 1936, were the lowest published rates in those areas for such services as were performed by plaintiff and are involved in this proceeding.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The question is whether plaintiff was compelled to pay a larger tax than it justly owed under Section 731 of the Revenue Act of 1932, 47 Stat. 169, 275. That section imposed a tax on the transportation of oil by pipe line. Its portions relevant here are as follows:

> (a) There is hereby imposed upon all transportation of crude petroleum and liquid products thereof by pipe line originating on or after the fifteenth day after the date of the enactment of this Act * * *—
>
> (1) A tax equivalent to 4 per centum of the amount paid on or after the fifteenth day after the date of the

enactment of this Act for such transportation, to be paid by the person furnishing such transportation.

(2) In case no charge for transportation is made, either by reason of ownership of the commodity transported or for any other reason, a tax equivalent to 4 per centum of the fair charge for such transportation, to be paid by the person furnishing such transportation.

(3) If (other than in the case of an arm's length transaction) the payment for transportation is less than the fair charge therefor, a tax equivalent to 4 per centum of such fair charge, to be paid by the person furnishing such transportation.

(b) For the purposes of this section, the fair charge for transportation shall be computed—

(1) from actual bona fide rates or tariffs, or

(2) if no such rates or tariffs exist, then on the basis of the actual bona fide rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or

(3) if no such rates or tariffs exist, then on the basis of a reasonable charge for such transportation, as determined by the Commissioner.

The applicable regulation [1] was as follows:

ART. 28. * * *

Where no tariffs have been published, the fair charge will be determined on the basis of the ordinary or customary charge for like or similar services. If no reasonable basis of comparison can be found, a full statement of the facts surounding the particular movement must be submitted to the Commissioner for his guidance and assistance in determining a fair charge.
* * *

From information available the Commissioner will determine what constitutes a fair charge for the purpose of this tax in respect of the particular movement under consideration.

Plaintiff transported oil from wells near two refineries owned by its parent company, National Refining Company, and made no charge for the service, hence it was necessary to fix the hypothetical charge which should be the basis for the tax by the methods provided in subdivision (b), clauses (2) or (3) of the section, and adverted to in the quoted regulation.

[1] Treasury Regulations 42 (1932 Ed.) as amended by T. D. 4394, XII-2, Cum. Bull. 354 (1933).

The period in question was from June 20, 1932 to February 29, 1936. Plaintiff paid taxes on the basis of a charge of 21 cents per barrel for transportation to its Findlay, Ohio, refinery, and 17 cents for transportation to its Marietta Ohio, refinery. It used those figures because under the Revenue Act of 1918, Section 501, subdivision (d) (40 Stat. 1057, 1103), which contained language similar to that of subdivision (b) of Section 731 of the Revenue Act of 1932, *supra*, the Commissioner had determined those to be the reasonable charges for the service.

The Commissioner, however, for the period here in question, applied the rates charged by two other pipe line companies which operated as common carriers in the vicinities of plaintiff's operations. The Buckeye Pipe Line Company charged 31.26 cents per barrel in both the Findlay and the Marietta neighborhoods in Ohio. The Eureka Pipe Line Company, operating in West Virginia in the neighborhood where plaintiff operated, charged 30 cents down to August 10, 1932, and 31.26 cents thereafter. The tariffs of both these companies were on file with the Interstate Commerce Commission. Plaintiff paid the higher taxes and filed a timely and adequate claim for refund which was rejected. This suit followed.

The Commissioner held, as we have seen, that plaintiff's services and those of the Buckeye and Eureka Companies in their respective areas were "like services," within the meaning of clause (2) of subdivision (b) of section 731 quoted above. Plaintiff contends that the services were not "like" plaintiff's, and that therefore the Commissioner should have determined under clause (3) what would have been a "reasonable charge" for plaintiff's services; that if he had done so he would have found that the charges of 21 cents and 17 cents, respectively, upon the basis of which plaintiff first paid its taxes, were reasonable charges. Plaintiff offered evidence of rates charged for "gathering" services in Pennsylvania, Michigan, and Kentucky, which were lower than the rates plaintiff used when it computed its tax.

Plaintiff urges that its services, and those of Buckeye and Eureka, were unlike in that plaintiff performed only a

"gathering" operation, while Buckeye and Eureka gathered, transported, stored, and turned their customers' oil over to connecting interstate carriers, all for the published charge. The fact that the operations of Buckeye and Eureka were much more extensive than plaintiff's is shown in Findings 9–14. Plaintiff says that if it had actually been paid 31.26 cents per barrel for the service it rendered, it would have made an annual return of some 150% on its investment.

It is true that under the tariff rates customers of Buckeye and Eureka could, if they desired them, obtain services much more extensive than those rendered by plaintiff. But it is also true that Buckeye and Eureka, in the neighborhoods where plaintiff operated, performed for their customers the exact services which plaintiff performed, if those were the services their customers called for. They gathered from well owners' tanks and transported the oil directly to the refineries of plaintiff's parent company. If these well owners' tanks were within the comparatively short distances which were also traversed by plaintiff's lines, they got for the published rate the same transportation that plaintiff gave its parent company and no more. Those who used the facilities of Buckeye and Eureka, and whose wells were farther from the market than the limits of plaintiff's lines, got more transportation. The customers of Buckeye and Eureka were, on the average, much farther from their markets, hence they received, on the average, much more transportation than plaintiff furnished its sole customer. The permitted tariff rates of those companies, if they were reasonable, were so only "on the average." If that is true then those rates would have been unreasonably high, if the only services available had been the short hauls such as plaintiff made, and there had been no long hauls to balance them.

Under the statute, however, the question for the Commissioner was not whether the charges of Buckeye and Eureka were reasonable charges for the kind of services plaintiff rendered. It was merely whether these companies did, at arm's length, charge these rates for services like those of plaintiff. Since he reasonably concluded that they

did so in fact, and for identical services, his inquiry ended there.

We do not mean to say that in every conceivable situation it would be necessary, or proper, to apply to a small operator the rates charged by a more extensive operator for the kind of service rendered by the smaller operator. The rates charged by the more extensive operator might just happen, because of their generality, to include a service so small that it obviously would not be worth the applicable rate. In most such cases, the tariff rate would be of little practical importance as to the small service because there would be few customers who would use the service. Suppose, for example, a trolley car company had a fare of ten cents for a ride, however short or long, on its ten miles of lines. The fare for two blocks would then be ten cents, but practically no customers would take so short a ride. Suppose a factory owner in the same city established a free trolley service for his workmen, the ride being for a distance equal to two blocks. A tax on trolley transportation comparable to the one on transportation of oil here in question, and containing a provision such as section 731 (b) (2) and (3), would probably not be properly assessable against the factory owner on the basis of a ten cent fare.

Nor do we mean to say that plaintiff's situation does not approach the peculiar situation just described. But we think it does not reach it, or at least reach it so conclusively that the Commissioner of Internal Revenue was without power to make the decision he made. As we have seen, subdivision (b) (2) of the section says:

> * * * then on the basis of the actual bona fide rates or tariffs of other pipe lines for like services, as determined by the Commissioner.

Here Buckeye and Eureka were furnishing the exact service furnished by plaintiff, and all owners of oil in the area covered by plaintiff, who did not, like plaintiff, have their own lines leading to a refinery, and who wished to have their oil transported to a refinery, were obliged to use the service and pay the rates. The rates were, therefore, not a mere hypothetical charge for a service that would seldom be called

for. They were the rates actually in effect for a service that had to be used. We think, therefore, that the Commissioner did not exceed his power in determining that the services of Buckeye and Eureka were "like services" to those of plaintiff, and that plaintiff's tax should be computed on the rates charged by those companies.

The petition will be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE BESSEMER LIMESTONE & CEMENT COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44648. Decided February 1, 1943; opinion amended May 3, 1943. Plaintiff's motion for new trial overruled May 3, 1943]

On the Proofs

Government contract; increased freight rates on finished product and raw materials.—Contract providing that the price for cement should be adjusted in accordance with any change in freight rates on cement during life of contract did not include any increased freight rates on raw materials used in the manufacture of the cement.

Same; intention of parties.—When the language of paragraph 1–10 of the specifications is construed in connection with the other provisions of the contract and specifications, and the conduct of the parties, it is clear that the parties had in mind at the time of making the contract only the freight rates on the cement.

The Reporter's statement of the case:

Mr. Donald J. Lynn for the plaintiff. *Messrs. Rhodes, Klepinger & Rhodes*, and *Harrington, Huxley & Smith*, were on the briefs.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff on February 20, 1935, entered into a contract with the Government to furnish and deliver cement to the site of a dam to be constructed by the Government, at a stated price

per barrel. It was provided in the specifications, paragraph 1-10, that if after the date and hour of opening bids and thereafter during the course of the contract there should be any change in the railroad rates the contract price for cement should be adjusted accordingly. Thereafter there was authorized by proper authorities an increase in freight rates on cement, which increased rates were applicable to the cement supplied by plaintiff under such contract and were paid by plaintiff; and such increased rates on cement were included on plaintiff's invoices to the Government, which invoices were paid and payment accepted by the plaintiff without protest.

The court held that plaintiff was not entitled to recover for increased freight rates which it paid on raw materials used in the manufacture of the cement.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at Youngstown, Ohio.

2. July 1, 1935, plaintiff succeeded to all of the right, title, and interest in and to all the assets formerly owned and belonging to the Bessemer Limestone & Cement Company, a corporation organized and existing under the laws of the State of Delaware. For the purposes of these findings the Delaware corporation and its successor, the Ohio corporation of the same name, will be treated as one and the same.

3. February 20, 1935, plaintiff entered into a contract with the defendant to furnish and deliver approximately 300,000 barrels of low-heat Portland cement to the Tygart River Reservoir Dam site, near Grafton, West Virginia, for the consideration of $1.70 per barrel. The contract provided that the cement would be invoiced at the current destination price of the contractor on the date of shipment if said price was below the contract price.

In the invitation for bids the plaintiff, together with all other bidders, was asked to and did furnish information as to the freight rate on cement from mill to destination, as well as the railway mileage from the place of manufacture to the place of delivery. No information was requested

regarding freight rates on raw materials to be used in manufacture, nor as to the distance that such raw materials would be hauled.

The Standard Government Form of Invitation for Bids (Exhibit B), the Specifications (Exhibit C), and the Contract (Exhibit D), are attached to the Stipulation of Facts. These exhibits and all other exhibits mentioned herein are made a part hereof by reference.

4. The Code of Fair Competition for the Cement Industry was approved November 27, 1933, and became effective 10 days after the date of approval. The plaintiff was a party to this code. The code is defendant's Exhibit A.

5. Two pertinent paragraphs of the specifications read as follows:

> 1–10. *Adjustment in contract price as a result of fluctuation of freight rates.*—If after the date and hour of opening bids and continuing throughout the course of the contract, there is any change in the official railroad freight rates existing and published at the time of opening bids, the contract price for cement shall be adjusted accordingly, any increase in cost resulting from an increase in freight rates will be borne by the Government and any decrease in cost resulting from a decrease in these rates will be deducted from payments to the contractor.
>
> 1–18. *Tax.*—Prices bid shall include any Federal tax heretofore imposed by the Congress which is applicable to the material on this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date of this contract and made applicable directly upon the production, manufacture or sale of the supplies covered by this contract, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

6. March 26, 1935, the Interstate Commerce Commission approved certain emergency charges for transportation of commodities over the lines of carriers operating in inter-

state commerce and authorized such carriers to establish emergency charges so approved. These emergency rates and charges continued in effect until December 31, 1936.

7. April 30, 1935, the Public Service Commission of the Commonwealth of Pennsylvania ordered that carriers by railroad in the State of Pennsylvania be permitted to apply the emergency freight rates and charges authorized and approved by the Interstate Commerce Commission on March 26, 1935, to intrastate traffic within the State of Pennsylvania, and to file special supplements to existing tariffs whereby the emergency freight rates and charges so approved by the Interstate Commerce Commission should be applied upon intrastate traffic within said State. These emergency rates and charges became effective May 6, 1935, and continued in effect until December 31, 1936.

8. The emergency freight rates and charges referred to in findings 6 and 7 were applicable to the cement shipped from plaintiff's plant to the site of the Tygart River Reservoir Dam and also to certain raw materials consisting of coal and iron pyrites cinder used in the manufacture of low-heat cement under the contract. The additional freight costs incurred and expended by plaintiff by reason of the imposition of the emergency freight rates and charges on the cement from plaintiff's plant to destination were included with the bid price for the cement and paid by defendant upon invoices prepared and submitted by plaintiff, and payments so made by defendant to plaintiff were accepted by plaintiff without protest. No claims for increased freight rates on raw materials were included in the invoices for any of these shipments.

9. Plaintiff has brought this suit to recover additional freight costs imposed by the emergency freight rates and charges on coal and iron pyrites cinder received at plaintiff's plant and used in the manufacture of low-heat cement under the contract. During the period from May 15, 1935, to December 31, 1936, the additional freight charges paid by plaintiff on coal amounted to $1,353.67 and on iron pyrites cinder amounted to $123.92, making a total of $1,477.59.

10. Paragraph 1–04 of the specifications reads as follows:

> *Approximate period over which deliveries will extend.* It is estimated that the first delivery of cement will be required at the dam site about March 15, 1935, and that deliveries will extend from that date over a period of two and one-half to three years.

The first shipment of cement under the contract was made on May 17, 1935, and the last shipment on November 5, 1937.

11. During the period from May 17, 1935, to December 31, 1936, when the emergency freight rates and charges were in effect, the plaintiff shipped to the defendant a total of 303,778.346 barrels of cement. Of this quantity, 75,060.266 barrels were shipped during the months of May, June, July, and August 1935, and 228,718.08 barrels during the months of January, March, April, June, July, September, and October 1936.

12. July 30, 1938, plaintiff filed a claim (Exhibit J to the Stipulation of Facts) with the contracting officer for additional compensation under the contract in the amount of $1,477.59 to cover additional freight charges paid by plaintiff upon coal and iron pyrites cinder used by plaintiff in the manufacture of low-heat cement furnished by it to the defendant, and this was the first written claim filed with the defendant for the amount of additional freight charges which are the basis of this suit.

13. August 23, 1938, plaintiff's claim was denied by the contracting officer on the ground "That adjustments for charges in freight rates under Paragraph 1–10 of the specifications are confined to the finished product, i. e., Cement and do not embrace the raw materials going into the manufacture thereof."

14. August 31, 1938, plaintiff filed its written appeal (Exhibit K to the Stipulation of Facts) with the Chief of Engineers, U. S. Army, Washington, D. C., on the ground that paragraphs 1–10 and 1–18 of the specifications were included in the contract to protect the contractor against any additional cost which might be assessed against the production and delivery of the goods contracted for by a

governmental agency, i. e., the Interstate Commerce Commission, through an increase in freight rates and/or the Congress by the passage of any tax laws or other measures.

15. November 17, 1938, the Chief of Engineers by letter to plaintiff (Defendant's Exhibit C) affirmed the decision of the contracting officer.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

On February 20, 1935, plaintiff entered into a contract with the defendant to furnish and deliver approximately 300,000 barrels of low-heat Portland cement to a reservoir dam site near Grafton, West Virginia. The consideration named was $1.70 per barrel, with a proviso that if at the date of any shipment the current destination price was below the price bid the defendant should have the advantage of such reduced price. Delivery was to cover a period of two and one-half to three years.

The specifications contained this further paragraph:

> 1–10. *Adjustment in contract price as a result of fluctuation of freight rates.*—If after the date and hour of opening bids and continuing throughout the course of the contract, there is any change in the official railroad freight rates existing and published at the time of opening bids, the contract price for cement shall be adjusted accordingly, any increase in cost resulting from an increase in freight rates will be borne by the Government and any decrease in cost resulting from a decrease in these rates will be deducted from payments to the contractor.

Soon after the contract was made the freight rates were increased on cement shipped from the point of manufacture to the point of delivery. There was also an increase in freight rates on the coal and iron pyrites cinder used by plaintiff in the manufacture of cement. Plaintiff was reimbursed for additional freight charges on the cement that was delivered. It was not reimbursed for the increased freight charges which it paid on the raw materials used in the manufacture of the cement. For this latter amount it sues.

The question is whether under the contract and specifications it should be reimbursed for the increased freight charges which it paid on the shipment of such materials.

In the invitation for bids the plaintiff, together with all other bidders, was asked to and did furnish information as to the freight rate on cement from mill to destination, as well as the railway mileage between these two points. No information was requested regarding freight rates on raw materials to be used in manufacture, nor as to the distance that such raw materials would be hauled.

In invoicing the various shipments plaintiff included the increased freight charges it had paid on cement. These bills were paid as rendered. There were 246 separate invoices. All these included the increased charges on cement. In none of them did the plaintiff render or make any claim for increased freight charges paid on the raw materials used in the manufacture of the cement. The first shipment of cement was made on May 17, 1935, and the last shipment on November 5, 1937.

On July 30, 1938, plaintiff filed a claim with the contracting officer for additional compensation in the amount of $1,477.59 to cover additional freight charges which it had paid on coal and iron pyrites cinder used by the plaintiff in the manufacture of the cement furnished by it to the defendant. This was the first claim filed with the defendant for such additional freight charges. The contracting officer denied the claim on the ground that adjustments for freight charges under the specifications were confined to the finished product, i. e., to cement, and that they did not embrace the raw materials which were used in the manufacture of such product.

Plaintiff insists that it was not possible to submit its claim for increased freight charges on raw materials at the time the various shipments of cement were made, because such raw materials went into the manufacture not only of low-heat cement for the Government, but into low-heat and other standard grades of cement for commercial use, and also because there was no separation of Government cement from the bulk until orders for stated quantities were received from the War Department.

We think the contracting officer rightly denied reimbursement for the additional freight charges paid by plaintiff upon coal and iron pyrites cinder.

If the language of paragraph 1–10 of the specifications were standing alone it would be difficult to determine whether it should be limited to the changes in freight rates on cement alone, or whether it should also include the freight rate changes on the shipment of raw materials used in its manufacture. However, when it is construed in connection with the other provisions of the contract and specifications and the conduct of the parties, it seems rather clear that the parties had in mind at the time of the making of the contract only the freight rates on the cement. The invitation for bids asked only for existing freight rates on cement and the railway mileage between the manufacturing plant and the point of destination. It made no reference to freight rates or distances in connection with any raw materials that might be used. There was no reference in either the contract or the specifications or any of the information asked or furnished that threw any light on what raw materials would be used, where they would be shipped from, or the sources from which they would be obtained. All the shipments were made and the terms of the contract fully carried out over a two and one-half year period. While some of the witnesses for the plaintiff testified that they had discussed among themselves the question of increased freight rates on coal and other raw materials within a month after the shipments began, no formal claim or written evidence of such claim was filed until several months after the last shipment was made and paid for. Not until several months after the last shipment was made and paid for was any claim made for increased freight charges paid on raw materials.

In the light of these undisputed facts and circumstances it would require a rather strained construction to include the increased freight charges on raw materials as being within the contemplation of the parties.

The petition should be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION v. THE UNITED STATES

[No. 45050]

LAURENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION v. THE UNITED STATES

[No. 45654]

[Decided February 1, 1943. Plaintiff's motions for new trial overruled May 3, 1943]*

Floor stocks taxes under Agricultural Adjustment Act, as amended, passed on to vendees and not refunded.—Where during the year 1934 floor stocks taxes on refined sugar on hand as of June 8, 1934, were paid by plaintiff in accordance with the provisions of the Agricultural Adjustment Act (48 Stat. 31, 35), as amended by the Jones-Costigan Act (48 Stat. 670, 672); and where it is shown by the evidence adduced that the taxes so paid by plaintiff were not borne by plaintiff but were passed on to the vendees and that no refund of such taxes had been made to said vendees by plaintiff; it is *held* that plaintiff is not entitled to reccver under the provisions of the Revenue Act of 1936, section 902 (49 Stat. 1648, 1747).

Same; taxes not passed on to vendees.—Where during the year 1933 floor stocks taxes on cotton bags on hand as of August 1, 1933, were paid by plaintiff in accordance with the provisions of the Agricultural Adjustment Act (48 Stat. 31, 35); and where it is shown by the evidence adduced that plaintiff in the ordinary course of business absorbed said taxes, and that said cotton bags were not sold but were furnished to plaintiff's customers as containers for sugar sold; it is held that plaintiff is entitled to recover under the provisions of the Revenue Act of 1936, section 902 (49 Stat. 1648, 1747).

Same; claim for refund timely filed under applicable statutes.—Where on June 29, 1937, plaintiff filed claim for refund on floor stocks taxes paid in 1933 and 1934 under the Agricultural Adjustment Act (48 Stat. 31) and under the Jones-Costigan Act amendatory thereto (48 Stat. 670); and where said claim for refund was held by the Commissioner of Internal Revenue to be insufficient; and where, later, on January 12, 1938, plaintiff filed additional

*Petition for writ of certiorari denied October 11, 1943.

facts and schedules as required by the Commissioner by letter dated December 29, 1937; and where such claim for refund was rejected on its merits by the Commissioner on January 29, 1938; it is *held* that the claim was timely filed, in accordance with the provisions of section 903 of the Revenue Act of 1936 (49 Stat. 1648, 1747) and of section 405 of the Revenue Act of 1939 (53 Stat. 862, 884) extending the time for filing claims from July 1, 1937, to January 1, 1940.

The Reporter's statement of the case:

Mr. Carl J. Batter for the plaintiff. *Mr. R. E. Milling* was on the briefs.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The petition in case No. 45050 was filed January 25, 1940. Proof for both sides was closed therein January 19, 1942. The petition in case No. 45654 was filed March 20, 1942. On April 25, 1942, the court allowed plaintiff's motion to consolidate case No. 45654 with case No. 45050. On May 15, 1942, the parties filed a stipulation providing "that the testimony heretofore taken in case No. 45050 may be considered as taken also in case No. 45654." In each of these two cases proof for both sides was closed May 16, 1942. The two cases will therefore be treated as one.

Lawrence M. Williams, plaintiff in case No. 45050 is the same person as Laurence M. Williams, plaintiff in case No. 45654. The correct spelling of his given name is L-a-u-r-e-n-c-e.

2. Since December 22, 1939, Laurence M. Williams has been and now is liquidator of Sterling Sugars, Inc., formerly a Louisiana corporation (hereinafter called the Louisiana corporation). It was organized in 1921 and was actively engaged in business until its dissolution in 1937.

The Louisiana corporation was succeeded in 1937 by Sterling Sugars, Inc., a Delaware corporation (hereinafter called the Delaware corporation), which took over all of its assets and assumed all of its liabilities.

Sterling Sugars Sales Corporation (hereinafter called the Sales corporation) was organized in 1933 by the Louisiana

corporation which at all times until 1937 owned all of its capital stock. The capital stock of the Sales corporation was part of the assets acquired by the Delaware corporation in 1937.

3. During its corporate life (1921–1937) the Louisiana corporation operated plantations for the production of sugarcane in the territory tributary to Franklin, Louisiana. During this same period it operated and owned a sugar cane grinding factory and a sugar refinery at Franklin, Louisiana. The refinery produced direct-consumption sugar, and under the Agricultural Adjustment Act, as amended, the Louisiana corporation held for sale on the floor stocks tax date, June 8, 1934, granulated or direct-consumption sugar amounting to 147,070 one hundred-pound units.

The Sales corporation acted as a sales conduit for the products of the Louisiana corporation, and was not liable for, and did not pay, the tax.

4. The Louisiana corporation filed returns and paid the floor stocks tax on the 147,070 one hundred-pound units of granulated or direct-consumption sugar on the following dates:

Sept. 25, 1934, for the month of June 1934	$3, 382. 81
Sept. 25, 1934, for the month of July 1934	33, 002. 68
Oct. 10, 1934, for the month of August 1934	42, 296. 96
Total floor stocks tax paid on direct-consumption sugar	78, 682. 45
The Louisiana corporation also paid on September 24, 1933, a floor-stocks tax on large cotton bags in the sum of	3, 164. 50
The total floor stocks paid by the Louisiana corporation amounted to	81, 846. 95
The Commissioner of Internal Revenue refunded	63. 36
leaving a net amount of floor stocks tax paid by the Louisiana corporation under the Agricultural Adjustment Act as amended of	81, 783. 59

5. On June 29, 1937, a claim for refund marked "Tentative Return" on PT Form 76 was filed bearing as the name of claimant, Sterling Sugars, Inc., and Sterling Sugars Sales Corporation, and subscribed and sworn to by J. D. Perilloux, Auditor. This claim was for the sum of $78,682.45, bore the

written legend under Schedule A thereof "Schedules to follow" but was accompanied by no schedules or any data except as to the amount claimed and the amounts and dates of payment of the tax for which refund was claimed. The claim for refund is plaintiff's Exhibit 5. This and all other exhibits mentioned are made a part of this report by reference.

6. By letter dated October 28, 1937 (plaintiff's Exhibit 6), the Deputy Commissioner of Internal Revenue advised the Louisiana corporation and Sterling Sugars Sales Corporation as to the requirements of Section 902 of the Agricultural Adjustment Act, and in the last two paragraphs stated:

> Your attention is invited to Article 202 of Regulations 96 which provides that each claim shall set forth in detail and under oath each ground upon which the refund is claimed, and that it is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> The schedules referred to in your claim and such other evidence as you may desire to submit should be forwarded to this office within sixty days from the date of this letter.

7. By letter dated December 29, 1937 (plaintiff's Exhibit 7), the Deputy Commissioner advised the Louisiana corporation and Sterling Sugars Sales Corporation that the evidence requested in the letter of October 28, 1937, had not been received and that if it were not furnished within thirty days from the date of the letter it would be necessary to proceed with the adjustment of the claim on the basis of the evidence on file.

8. In a letter dated January 12, 1938 (defendant's Exhibit D) addressed to the Deputy Commissioner and signed "Sterling Sugars, Inc., J. W. Downey, Secretary," both the floor-stocks tax and the processing tax were discussed. To this letter are attached schedules on the payments and collections of both the floor-stocks tax and the processing tax. In the letter appears this statement:

> Tax paid on floor stock in June, July, and August 1934, all of which was collected.

. January 29, 1938, the Deputy Commissioner wrote a letter (plaintiff's Exhibit 8) to Sterling Sugars, Inc., and Sterling Sugars Sales Corporation, two paragraphs of which read as follows:

> In one of the schedules attached to your letter dated January 12, 1938, in reply to office letter dated December 30, 1937, a statement is made that the entire floor-stocks tax was passed on to your customers.
>
> * * * * *
>
> Since it appears that you passed the tax on to your customers, the allowance of the claim is prohibited by the provision of law referred to above, and, accordingly, it is hereby rejected in full.

9. On December 28, 1939, a claim for refund was filed on PT Form 76 claiming a refund of $78,682.45 as floor-stocks tax paid on sugar, and $3,104.85 as floor-stocks tax paid on cotton, making a total of $81,787.30. This claim bore the name of Sterling Sugars, Inc., as claimant and was signed "Sterling Sugars, Inc., Laurence M. Williams, Liquidator." This claim for refund is plaintiff's Exhibit 9.

On the first sheet of the claim below the printed paragraph 7 there was inserted the following:

> The above seven paragraphs are subject to statements contained in Schedule D.

Under Schedule D are the following typewritten statements:

> Claimant filed a claim on Form PT 24 under date of March 28, 1934 for the refund of the total amount paid, that is, $3,164.50, as floor stocks on cotton bags, on the ground that it was the ultimate consumer, and on other grounds.
>
> On October 23, 1934 there was refunded to this taxpayer $63.36. Claim is now filed herewith for the balance of $3,104.85 under the Revenue Act of 1936 as amended by the Revenue Act of 1939 on the grounds that:
>
> > The tax has been declared unconstitutional and is refundable in any event.
> >
> > The claimant bore the burden of the tax and did not pass it on.
> >
> > The claimant is the ultimate consumer of the cotton bags, used as a container for sugar, and bearing claimant's name in ink.

A joint claim on form PT 76 in tentative form was filed by this claimant and the Sterling Sugars Sales Corporation on June 11, 1937, in the amount of $78,-682.45 covering payments of floor stocks tax on sugar. That claim was rejected on January 29, 1938 on the grounds that "the entire floor stocks tax was passed on to your customers." This quoted statement was based on claimant's letter of January 12, 1938 and statements attached thereto; resulting in a mutual misunderstanding of the facts.

This claim is filed by this claimant as an original claim in its own right and on its own behalf without reference to Sterling Sugars Sales Corporation, as the tax was not passed on but was borne by this claimant. The tax was not billed separately nor passed on; and, what was intended to be conveyed by the documents in support of the rejected claim was that the sugar on which the floor stocks tax had been paid had been sold and was not on hand. The tax is also refundable for the reason that it has been declared unconstitutional and is refundable in any event.

It is the intention of this claimant to prepare and submit additional facts and data in support of the grounds above stated. All of the additional data will be submitted just as soon as it is compiled.

10. On August 17, 1940, the Deputy Commissioner wrote a letter (plaintiff's Exhibit 10) to Sterling Sugars, Inc., the last two paragraphs of which read as follows:

Section 903 of the Revenue Act of 1936 provides that the Commissioner is authorized to prescribe by regulations, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act. Article 302 of Regulations 96, promulgated under this authority, provides that only one claim shall be filed by any person for refund of floor stocks taxes, and that the claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floor stocks taxes paid by him.

Since your first claim for refund of floor stocks tax was considered and adjusted, and since only one claim for refund of floor stocks tax may be filed by you, there is no basis upon which consideration may be given to the claim subsequently filed by you under date of December 28, 1939 (No. C-25251). Therefore, this claim is hereby disallowed in full.

11. The floor-stocks tax on the cotton content of bags used as containers for the sugar, imposed August 1, 1933, under the Agricultural Adjustment Act of May 12, 1933, was paid by the Louisiana corporation on September 14, 1933. The prices of sugar and of cotton bags remained the same on and near the date of the imposition of the tax.

12. The rate of floor-stocks tax on sugar held for sale June 8, 1934, was based on "pounds of raw value" which, reflected in pounds of refined sugar, was 53½ cents per hundred pounds.

13. The Louisiana corporation produced the 147,070 one hundred-pound units of granulated or refined sugar on hand June 8, 1934, at varying dates from December 1932 to June 8, 1934. Such sugar was produced from sugar cane grown on the Louisiana corporation's own plantations, from sugar cane purchased from other growers under competitive conditions, and from raw sugar purchased in highly competitive markets. All costs in the manufacture of such refined sugar had been incurred by that date.

14. The Louisiana corporation produced but one product, refined or granulated sugar. It did not do a carton or specialty business. Its product was bulk sugar, sold by weight, packed in 100-pound units. It packed the refined sugar in 100-pound sacks; four 25-pound sacks contained in a 100-pound burlap bag; ten 10-pound sacks contined in a 100-pound burlap bag; or twenty 5-pound sacks contained in a 100-pound burlap bag.

The Louisiana corporation sold its product at a discount of 10 cents below standard brands of its competitors. Its product, refined sugar, was sold in an open competitive market at prevailing market prices less the discount named, and less a further discount of 2% which latter was a customary discount in the sugar trade generally.

15. The marketing territory for the product of the Louisiana corporation was definitely limited to the Mississippi Valley. This was due to the freight rate structure and the limit of areas to be reached by barge shipments on the Mississippi River and its tributaries. The territory was hemmed in on the north and west by competition from the beet sugar refiners, and on the east and south by the Atlan-

tic Seaboard and Texas refiners. Within its limited territory the Louisiana corporation had all the competition of the other Louisiana refiners.

The refined sugar produced annually by the Louisiana corporation was about one-half of one percent of the sugar consumed in the United States. The cane processed by it was a little less than 4% of the cane produced in Louisiana.

16. Neither the Sales corporation nor the Louisiana corporation acting through the Sales corporation billed the floor-stocks tax as a separate item.

17. Neither the Louisiana corporation nor the Sales corporation had a sales organization of its own. Independent brokerage concerns were employed on a commission basis to sell the refined sugar at prevailing prices.

18. The Louisiana corporation maintained large stocks of refined sugar for long periods of time at public warehouses in Memphis, Tennessee; Louisville, Kentucky; Lexington, Kentucky; Portsmouth, Ohio; and other places.

19. Refined sugar was sold on a four-payment plan with a guarantee against price decline. Some refiners guaranteed the price only against their own decline, others guaranteed the price against declines of any competitor as well. The Louisiana corporation through the Sales corporation guaranteed its customers against all price declines, whether of its own or of competitors.

20. Early in 1933 there were large excess stocks of sugar in Porto Rico, the Philippines, Cuba, and the United States, which exercised a depressing effect on the market price of sugar. The island territories had greatly increased their shipments of sugar to the United States. The Philippine Islands had increased their shipments from 318,000 tons in 1924 to 1,141,000 tons in 1933, and the Hawaiian Islands had increased their shipments from 608,000 tons in 1924 to 989,500 tons in 1933. The United States beet sugar crop in 1933 exceeded any previous crop by 300,000 tons.

21. Cuba for some years had been a large supplier of sugar to the United States. The importation of sugar from Cuba was subject to the tariff. Sugar from the island possessions came in duty-free. In 1928 the shipment of sugar from Cuba

to the United States was 3,125,000 tons. In 1932 the shipment of sugar from Cuba to the United States was 1,762,500 tons, a reduction of 1,362,500 tons. This intensified the depression in Cuba and resulted in reducing exports of other products from the United States to Cuba that required about 817,000 acres of land to produce.

22. Early in 1933 the refiners, the beet processors, the beet growers, the cane interests, the Cubans, the Porto Ricans, the Hawaiians, and the Filipinos endeavored with the sponsorship of the United States Department of Agriculture to negotiate a stabilization agreement intended to limit supplies of sugar from the various areas to a point where sugar prices could be held up. Such an agreement was reached the last of August 1933.

While these negotiations were going on, sugar prices advanced substantially. About the middle of September 1933 the Secretary of Agriculture declined to approve the agreement and sugar prices started to decline. The price of refined sugar in mid-September 1933 was $4.70 per unit of 100 pounds, at which time the price of raw sugar was about $3.65. During the period from mid-September 1933 to December 19, 1933, the price of refined sugar declined from $4.70 to $4.30, while the price of raw sugar declined from about $3.65 to $3.19 for the same period.

23. February 8, 1934, the President sent a message to Congress recommending that sugar be made a basic agricultural commodity. In his message the President said that "consumers need not and should not bear the tax."

The Secretary of Agriculture in a press release dated March 16, 1934, advocated the passage of the sugar amendment to the Agricultural Adjustment Act and among the reasons urged were: "To restore Cuban purchasing power to some extent so that the market for the products of 817,000 acres of American farm land * * * may be restored," and, "to protect the consumer against price advances resulting from the processing tax."

On February 11, 1934, refined sugar prices advanced from $4.30 to $4.50. This advance held until April 18, 1934.

The price of raw sugar advanced from $3.19 December

19, 1933, to $3.43 February 11, 1934. The price of raw sugar declined from $3.42 February 11, 1934, to $2.71 April 18, 1934.

24. On May 9, 1934, the President signed the Jones-Costigan amendment to the Agricultural Adjustment Act, which made sugar a basic agricultural commodity. This amendment imposed a floor-stocks tax on refined sugar on hand on June 8, 1934, and a processing tax on sugar refined after that date of 53½ cents per unit of 100 pounds. Within the 30 days intervening there was a natural effort to move stocks of sugar into the hands of retailers and customers. For several months prior to the effective date of the act the price of refined sugar fluctuated, reaching $4.50 on February 11, 1934, just after the President's message was delivered. On June 7, 1934, the day before the taxes became effective, the price was $4.00 per hundred. During the same period the price of raw sugar also varied widely, being $3.42 on February 11, and $2.80 on June 7, 1934.

25. In this sugar program which went into effect June 8, 1934, as gleaned from the Jones-Costigan amendment and other action taken, were the following objectives: to stabilize sugar prices; to make benefit payments to farmers; to raise the money for such payments by a processing tax of 53½ cents per hundred pounds; to restore trade with Cuba and at the same time protect consumers against price advances resulting from the processing tax, the tariff on refined sugar was reduced from $2.12 to $1.59 per hundred pounds.

26. Sugar prices from the first of the year 1933 to June 8, 1934, were determined by a number of factors. As heretofore stated, in the beginning of 1933 there were large excess stocks of sugar and by all ordinary rules the price of sugar should have been very low. Probably the only thing that kept the price of sugar from going very low was the feeling that the new Administration's efforts to increase commodity prices in general would be successful. Other factors were the negotiations to reach a stabilization agreement, the agreement itself, and the disapproval of such agreement by the Secretary of Agriculture, referred to in finding 22; and factors referred to in findings 23, 24, and 27.

27. In the first week of June 1934, refined sugar reached the low price of $4.10 per hundred pounds, which is the same as it was in January 1933. In mid-September 1933, the price of refined sugar reached the high point of $4.70 per hundred pounds. On June 8, 1934, the date the tax of 53½ cents became effective, refined sugar prices increased 55 cents per hundred pounds, which was an increase due to, and to cover, the newly imposed tax.

28. The Louisiana corporation made no refunds of the tax to its vendees after the tax was invalidated January 6, 1936, or at any other time.

29. The Louisiana corporation bore the entire burden of the tax on large cotton bags amounting to $3,164.50, of which $63.36 was refunded, leaving a balance of $3,101.14.

The court decided that the plaintiff was not entitled to recover for floor stocks taxes on sugar which were passed on to the vendees and not refunded, and that plaintiff was entitled to recover for floor stocks taxes paid on cotton bags and not passed on to vendees but absorbed by plaintiff.

JONES, *Judge*, delivered the opinion of the court:

This suit is based on a claim for refund of $81,723.94 in floor stocks taxes on sugar and cotton which plaintiff alleges were paid by the corporations involved and not passed on to the vendee.

The plaintiff is liquidator of Sterling Sugars, Inc., a Delaware corporation. That corporation in 1937 succeeded another corporation by the same name which was a Louisiana corporation and which had been organized in 1921. Sterling Sugars Sales Corporation was organized in 1933 and at all times until 1937 all of its capital stock was owned by the Louisiana corporation. Since all these companies represented the same interests and participated in the same transaction, all their acts, for the purpose of simplicity in discussion, will be referred to as the acts of the plaintiff.

Under an amendment to the Agricultural Adjustment Act, adopted May 9, 1934 (48 Stat. 670, 672), a floor-stocks tax on refined sugar became effective June 8, 1934, on all stocks of sugar then on hand. During the year 1934 the plaintiff paid $78,682.45 in such taxes.

Under the Agricultural Adjustment Act, approved May 12, 1933 (48 Stat. 31, 35) a floor-stocks tax was imposed on cotton bags on hand August 1, 1933. Plaintiff paid during the year 1933 $3,164.50 in taxes on these bags. This was later corrected $63.36 being refunded, leaving $3101.14 as the net amount paid.

Plaintiff claims that since the processing and accompanying floor stocks taxes were held invalid by the Supreme Court on January 6, 1936,[1] he is entitled to a refund of such taxes.

By the terms of Section 902 of the Revenue Act of 1936 (49 Stat. 1648, 1747), provision was made for the refund of these taxes on compliance with the conditions set out therein. In brief, this statute required that claimant establish to the satisfaction of the Commissioner of Internal Revenue that he had paid the tax, that he had borne the burden thereof, that he had not passed it on to the vendee either separately or included within the price of the commodity; or that if such tax had been passed on, he had repaid it unconditionally to the vendee, and that the latter had not otherwise been relieved thereof or reimbursed therefor.

Section 903 of the same act provides for the method of filing of such claims.

Section 405 of the Revenue Act of 1939 (53 Stat. 862, 884), extended the time for filing claims from July 1, 1937, to January 1, 1940.

Treasury Regulations 96 (1936 Edition) set out in detail the method of filing claims and making proof thereof.

Defendant first makes the technical defense that when the plaintiff first filed his tentative claim he did not furnish proper proof of his claim as required by the regulations, and that his amended claim was filed after the period allowed by the regulations and rules for the filing of such claims had expired; and, further, that such regulations permitted the filing of only one claim.

On June 29, 1937, a claim for refund marked "tentative return" on PT Form 76 was filed. On October 28, 1937, the Deputy Commissioner of Internal Revenue wrote plaintiff informing him that he had not filed sufficient facts with his

[1] *United States* v. *Butler, et al.*, 297 U. S. 1.

return and advising him that unless such facts were filed within 60 days his failure to do so would result in disallowance of the claim. On December 29, 1937, the Deputy Commissioner advised the taxpayer that the evidence requested in the letter of October 28 had not been received and that if it were not furnished within 30 days from the date of the second letter it would be necessary to proceed with the adjustment of his claim on the basis of the evidence on file. On January 12, 1938, the plaintiff furnished additional facts with attached schedules.

On January 29, 1938, the Deputy Commissioner wrote plaintiff a letter advising him that as the schedules attached by plaintiff to the letter dated January 12, 1938, stated that he had passed the tax on to his customers, the claim was rejected.

Since the regulations were issued by the Commissioner of Internal Revenue, and since the additional facts were filed within the time specified by the Commissioner in his second letter dated December 29, 1937, the defense that the claim was not properly filed cannot be sustained.

After the extension of the time within which claims might be filed under the Revenue Act of 1939, *supra*, the plaintiff filed another claim covering the identical subject matter. This was made the basis of a second suit which was evidently filed as a precautionary step, and the two suits have been consolidated.

We think the claim is properly before the court for consideration on its merits.

Do the facts as disclosed by the record show that plaintiff complied with the requirements of the statute which were set out as conditions to his right to recover the taxes paid on floor stocks of sugar on hand on June 8, 1934? We do not think so.

Plaintiff paid the tax, but the evidence shows very clearly that he passed it on in the form of increased prices on the refined sugar which he sold to his customers.

Sugar was sold in a competitive market. On the day when the processing and floor stocks taxes became effective the price of refined sugar increased 55 cents per hundred pounds,

approximately the amount of the tax. Plaintiff, together with all those in the competitive field, made similar increases in the price of sugar to their respective customers.

Plaintiff in connection with his claim included the following:

> Tax paid on floor stock in June, July, and August, 1934, all of which was collected.

He explained that this was a mistake of the secretary who filed the claim, and that what was intended to be conveyed was that this amount had been paid by plantiff and collected by the Government. Such an error was possible, but the claim of mistake would be much more persuasive had there not been other revealing facts and circumstances indicating that the taxes were passed on in the form of increased prices to the vendees.

In sending the various invoices to his customers, the plaintiff in each instance recited that the amount of the bill was the sum rendered "tax included." Here is the pertinent part of a typical bill:

Quantity	Commodity	Prices	Plus PP Frt.
* * * 600 * * *	Bags Sterling Fine Granulated Sugar	$4.55	Tax Included.
* * * 600 * * *	Bags Arlington Brand Sugar	$4.45	Tax Included.
		F. O. B. Sterling, La.	

After the taxes were held invalid various customers wrote the plaintiff asking for a refund of the taxes which they claimed had been passed on to them. In replying to each of these letters plaintiff did not deny that he had passed the tax on, but on the contrary in effect admitted he had done so. The pertinent part of a typical reply letter from plaintiff is as follows:

> This corporation has paid processing taxes to the Internal Revenue Department of the Government on all sugars which have been sold by us to buyers, who in turn remit to us the amount of processing tax which was included in our invoices.
>
> Some of our buyers have in fact attempted to deduct the processing taxes from their remittances, thereby attempting to cause us to lose 53½¢ per hundred lbs. of sugar. In every instance we have returned remittance that shows such deductions.

All of the above being true, we respectfully decline your request to return or refund to you any processing taxes which we assessed against shipments to you.

It is true that this letter refers to processing taxes rather than floor-stocks taxes, but the subject matter is the same. The floor-stocks taxes were in effect processing taxes applying to stocks on hand that had already been processed, so that the entire commodity might be covered, so that there might not be any favoritism between competitors in the same field, and to prevent companies piling up floor stocks between the time of announcement and the effective date of the tax and thus avoiding payment. The taxes were for identical amounts. Naturally the customers did not know whether their orders had been filled from stocks on hand or from newly processed goods. It was customary to refer to all of them as processing taxes, which is in effect what they were.

When plaintiff's witnesses were on the stand they studiously avoided saying that the floor-stocks and processing taxes were not included within the price of refined sugar as invoiced to their customers.

It is very clear from this record that the plaintiff passed the tax on to the respective vendees and that he consequently did not bear the burden of the tax. He is therefore not entitled to a refund of the floor-stocks taxés on sugar which he paid on stocks which were on hand on June 8, 1934, and which are involved in this suit.

The floor-stocks tax on cotton bags fall into an entirely different category. The plaintiff paid the floor-stocks tax on cotton bags which he had on hand on June 8, 1934. The record shows that he did not sell these sacks. He furnished them as containers for the sugar. He did not pass the tax on to anyone. He absorbed this small tax which he had paid and the burden of which he therefore bore. The undisputed testimony shows that these taxes were paid, that they were not passed on and that all the conditions of the statute were met.

The plaintiff is entitled to recover the sum of $3,101.14. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

UNION ASSURANCE SOCIETY, LIMITED, v. THE UNITED STATES

[No. 45456. Decided February 1, 1943; opinion modified May 3, 1943. Plaintiff's motion for new trial overruled May 3, 1943]

On the Proofs

Income tax; foreign insurance company other than life or mutual; computation of allowable deduction for foreign tax paid on income derived from domestic sources.—Where plaintiff, a British insurance corporation other than life or mutual, engaged in the insurance business in various countries, including the United States, and affiliated with other companies also so engaged in such business, for the tax years 1930, 1931 and 1932 filed income tax returns showing gross income from all sources and gross income from sources within the United States; the Commissioner of Internal Revenue properly determined income subject to Federal income tax by limiting deduction for British income taxes paid to an amount not in excess of that resulting by applying the British tax rate to the taxable income of the corporation from sources within the United States.

Same; discretion of Commissioner.—Under section 119 of the statute (45 Stat. 791) which provides that from the gross income from sources within the United States "there shall be deducted the expenses, losses and other deductions properly apportioned or allocated thereto," the use of the word "properly" imports some discretion and flexibility in the rules and regulations which were to be prescribed by the Commissioner of Internal Revenue.

Same.—*London & Lancashire Insurance Co.* v. *Commissioner*, 34 B. T. A. 295, 298, cited. See also *Universal Winding Co.* v. *Commissioner*, 39 B. T. A. 962. *Third Scottish American Trust Co.* v. *United States*, 93 C. Cls. 160, distinguished.

The Reporter's statement of the case:

Mr. Edward S. Coons, Jr., for the plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Plaintiff, a British insurance corporation other than life or mutual, engaged in the insurance business in various countries, including the United States, and affiliated with other companies also so engaged in such business, for the tax years 1930, 1931 and 1932 filed income tax returns showing gross

income from all sources and gross income from sources within the United States, with supporting schedules from which plaintiff computed a net taxable income from sources within the United States.

In computing such tax plaintiff determined its deduction for British income taxes, under sections 23, 119 and 232 of the Revenue Act of 1928, and the pertinent Regulations, by applying to the total British income tax paid by the consolidated group of affiliated corporations on income from all sources the percentage which plaintiff's gross income from sources within the United States bore to the total gross income from all sources of the consolidated group.

In reviewing plaintiff's returns for said years the Commissioner of Internal Revenue made use of the ratio method followed by plaintiff but in addition placed as a limitation thereon a maximum allowance determined by applying the British income tax rate of 25 per cent to plaintiff's actual United States taxable income without deduction for British income taxes and exclusive of United States income from which British tax was withheld at the source; and, accordingly, there resulted a decrease of plaintiff's allowed deduction for British income tax paid and a corresponding increase in tax due to the United States for each of said tax years, reflected in a deficiency assessment by the Commissioner for each of said tax years.

The court held that the limitation applied by the Commissioner was proper and plaintiff was not entitled to recover.

The court made special findings of fact as follows, upon the agreed statement of facts:

1. Plaintiff, a corporation existing under the laws of Great Britain, is one of 22 subsidiaries of Commercial Union Assurance Company, Limited, all of which were engaged during the years 1930, 1931, and 1932 in the insurance business in various parts of the world. The principal office of the consolidated group is in London, England, and plaintiff's principal office within the United States is in New York City. Plaintiff is a foreign insurance company, other than life or mutual, as defined by Section 204 of the Revenue Acts of 1928 and 1932.

2. On June 15, 1931, plaintiff filed its United States income tax return for the calendar year 1930, showing gross income from all sources of $8,303,963.74, including gross income from sources within the United States of $1,590,669. Adjustments agreed upon by plaintiff and the Commissioner of Internal Revenue reduced plaintiff's gross income from sources within the United States to $1,555,705.38. Thus, the ratio of gross income from sources within the United States to gross income from all sources was 18.734%.

3. Plaintiff's income from all sources which was subjected to British income taxes at the rate of 25% was $744,868.48 in 1930. Thus plaintiff incurred British income tax liability in 1930 of $186,217.12, which amount was duly paid and proof thereof made to the United States Commissioner of Internal Revenue.

4. Plaintiff's net taxable income from sources within the United States was reported in the return filed as $79,557.60, and the income tax thereon shown due was $9,546.91. Said amount was paid as follows:

June	15, 1931	$4.773.46
September	15, 1931	2,386.73
December	15, 1931	2,386.72

The return reflected a deduction from gross income from sources within the United States of $11,217 for British income taxes. The Commissioner of Internal Revenue reduced that deduction to $5,611.58, resulting, with other minor adjustments in the assessment of a deficiency of $1,062.50, which amount was paid by plaintiff, together with interest of $188.91, on June 28, 1934.

5. On December 13, 1933, and May 12, 1936, plaintiff duly filed claims for refund, alleging errors by the Commissioner of Internal Revenue in the determination of its deduction for British income taxes for 1930, and on March 23, 1940, it duly filed an amended claim for refund relating to the same subject matter. The basic issue in these claims, which gave rise to the refund demanded by plaintiff, was decided favorably to plaintiff by the United States Supreme Court in *Biddle* v. *Commissioner*, 58 Sup. Ct. 379, 302 U. S. 573. Thereupon, the Commissioner of Internal Revenue undertook recomputation of plaintiff's deduction for British income

taxes for 1930, which resulted in partial allowance and partial disallowance of its claims for refund, as hereinafter stated. Photostatic copies of said claims are attached hereto and made a part hereof, and identified as Exhibits A, B and C.

6. Since plaintiff's British income tax liability for 1930 on its income from all sources was $186,217.12, the amount of its deduction permissible from United States income for such taxes under the apportionment method (18.734%) would be $34,885.92. However, the Commissioner of Internal Revenue limited plaintiff's deduction from United States income on account of its British income tax liability to an amount determined by applying the British income tax rate of 25% to plaintiff's actual United States net taxable income without deduction for British income taxes and exclusive of United States income from which British tax was withheld at the source, i. e., $89,531.89. The Commissioner thus allowed plaintiff a deduction of $22,382.97, plus $1,071.82 British taxes paid at the source on United States income, or a total of $23,454.79.

7. Accordingly, by certificate of overassessment issued September 12, 1940, the Commissioner of Internal Revenue (after reducing plaintiff's deduction for depreciation by $272.24 as an offset) allowed plaintiff's claim for refund to the extent of $2,108.52 tax overpaid, plus interest overpaid of $188.91. On the same date he notified plaintiff by registered mail that the balance of its claim ($1,500.35) was disallowed. Of the amount so disallowed $159.65 is not covered by a timely claim for refund.

8. On June 15, 1932, plaintiff filed its United States income tax return for the calendar year 1931, showing gross income from all sources of $5,271,567.16, and gross income from sources within the United States of $1,512,827.44. Adjustments agreed upon by plaintiff and the Commissioner of Internal Revenue reduced plaintiff's gross income from sources within the United States to $1,468,572.44. Thus, the ratio of gross income from sources within the United States to income from all sources was 27.858%.

9. Plaintiff's income from all sources which was subjected to British income taxes at the rate of 25% was $414,808.80 in 1931. Thus plaintiff incurred British income tax lia-

bility in 1931 of $103,702.20, which amount was duly paid and proof thereof submitted to the United States Commissioner of Internal Revenue.

10. Plaintiff's net taxable income for 1931 from sources within the United States was reported in the return filed as $63,319.60, and the income tax thereon shown due was $7,598.35, which amount was paid as follows:

June 14, 1932	$1,899.59
September 15, 1932	1,899.59
December 15, 1932	1,899.59
March 14, 1933	1,899.58

The return reflected a deduction from gross income from sources within the United States of $5,651 for British income taxes. The deduction was reduced to $4,617.60 in a reaudit by the Commissioner of Internal Revenue, but, by reason of other adjustments, there resulted an overassessment and overpayment of $135.31, which was allowed plaintiff and was credited against additional taxes assessed for other years on June 28, 1934.

11. On May 29, 1934, plaintiff duly filed claim for refund, alleging errors by the Commissioner of Internal Revenue in the determination of its deduction for British income taxes for 1931, and on March 23, 1940, it duly filed an amended claim for refund relating to the same subject matter. The basic issue in these claims was decided favorably to plaintiff by the United States Supreme Court in *Biddle* v. *Commissioner*, 58 Sup. Ct. 379, 302 U. S. 573. Thereupon, the Commissioner of Internal Revenue undertook recomputation of plaintiff's deduction for British income taxes for 1931, which resulted in partial allowance and partial disallowance of its claims for refund, as hereinafter stated. Photostatic copies of said claims are attached hereto and made a part hereof, and identified as Exhibits D and E.

12. Since plaintiff's British income tax liability for 1931 on its income from all sources was $103,702.20, the amount of its deduction permissible from United States income for such taxes under the apportionment method (27.858%) would be $28,889.36. However, the Commissioner of Internal Revenue limited plaintiff's deduction from United States income on account of its British income tax liability to an amount

determined by applying the British income tax rate of 25% to plaintiff's actual United States net taxable income without deduction for British income taxes and exclusive of United States income from which British tax was withheld at the source, i. e., $63,808.10. The Commissioner thus allowed plaintiff a deduction of $15,952.01, plus $831.54 British taxes paid at the source on United States income, or a total of $16,783.55.

13. Accordingly, by certificate of overassessment issued September 12, 1940, the Commissioner of Internal Revenue (after reducing plaintiff's deduction for depreciation by $324.63 as an offset) allowed plaintiff's claims for refund to the extent of $1,420.96. On the same date he notified plaintiff by registered mail that the balance of its claim ($1,552.48) was disallowed.

14. On June 15, 1933, plaintiff filed its United States income tax return for the calendar year 1932, showing gross income from all sources of $5,293,991.61, and gross income from sources within the United States of $1,411,691.27. Adjustments agreed upon by plaintiff and the Commissioner of Internal Revenue reduced plaintiff's gross income from sources within the United States to $1,365,794.92. Thus the ratio of income from sources within the United States to income from all sources was 25.799%.

15. Plaintiff's income from all sources for 1932 subjected to British income taxes at the rate of 25% was $434,394.72. Thus plaintiff incurred British income tax liability in 1932 of $108,598.68, which amount was duly paid and proof of payment submitted to the United States Commissioner of Internal Revenue.

16. Plaintiff's net taxable income for 1932 from sources within the United States was reported in its income tax return as $16,405.09, and United States income tax was shown due thereon in the amount of $2,255.70, which amount was paid as follows:

March	14, 1933	$1,008.22
June	15, 1933	119.63
September	15, 1933	563.93
December	15, 1933	563.92

The return reflected a deduction from gross income from sources within the United States of $12,075 for British income taxes. The deduction was reduced to $11,695.67 in the Commissioner's preliminary audit, which, together with other adjustments to plaintiff's net income, resulted in a deficiency assessment of $165.43, which was paid together with interest thereon of $12.67, on July 12, 1934. In a second reaudit the Commissioner reduced the deduction to $2,664.38, resulting in an additional deficiency of $1,231.38, which amount was paid by plaintiff together with interest thereon of $123.14, on February 23, 1935.

17. On March 13, 1935, plaintiff duly filed claim for refund, alleging errors by the Commissioner of Internal Revenue in the determination of its deduction for British income taxes for 1932, and on March 23, 1940, it duly filed an amended claim for refund relating to the same subject matter. The basic issue in these claims, which gave rise to the refund demanded by plaintiff, was decided favorably to plaintiff by the United States Supreme Court in *Biddle* v. *Commissioner*, 58 Sup. Ct. 379, 302 U. S. 573. Thereupon, the Commissioner of Internal Revenue undertook recomputation of plaintiff's deduction for British income taxes for 1932, which resulted in partial allowance and partial disallowance of its claims for refund, as hereinafter stated. Photostatic copies of said claims are attached hereto and made a part hereof, and identified as Exhibits F and G.

18. Since plaintiff's British income tax liability for 1932 on its income from all sources was $108,598.68, the amount of its deduction permissible from United States income for such taxes under the apportionment method (25.799%) would be $28,017.38. However, the Commissioner of Internal Revenue limited plaintiff's deduction from United States income on account of its British income tax liability to an amount determined by applying the British income tax rate of 25% to plaintiff's actual United States net taxable income without deduction for British income taxes and exclusive of United States income from which British tax was withheld at the source, i. e., $26,352.77. The Commissioner thus allowed plaintiff a deduction of $6,588.19, plus $816.84 British taxes

paid at the source on United States income, or a total of $7,405.03.

19. Accordingly, by certificate of overassessment issued September 12, 1940, the Commissioner of Internal Revenue (after reducing plaintiff's deduction for depreciation by $392.01 as an offset) allowed plaintiff's claim for refund to the extent of $597.94 plus interest overpaid of $58.14. On the same date he notified plaintiff by registered mail that the balance of its claim ($2,946.51) was disallowed.

20. Plaintiff and its affiliated corporations are assessed for British income tax on a consolidated basis. The consolidated net income under the British statute is the aggregate of the net profits less net losses from all sources of the various companies in the group. A British corporation which is a member of a consolidated group for income tax purposes may obtain a statement from the Commissioner of Inland Revenue showing the amount of its income from foreign sources which entered into the consolidated assessment. The United States Commissioner of Internal Revenue required only that plaintiff file with its United States income tax returns, in substantiation of its deductions for British income taxes, (1) a schedule of its gross income from all sources, reconciled with its annual financial statement, (2) a statement showing its net income from all sources subject to British income tax, and (3) a schedule of the consolidated assessment, showing the net taxable income or loss of each of the 23 companies in the consolidated group of which plaintiff is a member, together with all adjustments producing the consolidated tax liability, and (4) receipts for payment of the consolidated assessment. The plaintiff complied with these requirements.

21. The plaintiff's taxable years 1928, 1929, and 1933 were also considered by the Commissioner of Internal Revenue at the same time as the years here in question. For each of the years 1928, 1929, and 1933 the plaintiff's British income tax deduction, computed by applying the British tax rate to the United States net taxable income, without any deduction for British taxes and exclusive of United States income from which British tax was withheld at the source, exceeded the

amount computed by applying to the British tax on income from all sources the ratio of United States gross income to gross income from all sources. For each of those years, however, the Commissioner allowed only the deduction computed under the latter method. A photostatic copy of the Commissioner's final audit statement, showing his computation of the plaintiff's deduction for British income taxes for each of the years 1928 through 1933, both inclusive, is submitted herewith and made a part hereof and identified as Exhibit H, subject to the following qualification. The defendant admits the truth of the facts contained in this finding (21), and that the copy of the Commissioner's final audit statement is a true and correct copy, but objects to the admissibility of such facts and to the admissibility of such statement, in so far as they relate to taxable years other than 1930, 1931, and 1932, on the ground that they are immaterial and irrelevant.

22. If the court should determine that plaintiff is entitled to compute its British tax deductions for 1930, 1931, and 1932 on the apportionment method and that the Commissioner of Internal Revenue was in error in limiting plaintiff's deductions as set out hereinabove, then plaintiff is entitled to judgment in the following amounts:

1930	$1,340.70
1931	1,552.48
1932	2,946.51 (plus $77.67 interest),

or a total sum of $5,917.36, together with interest as provided by law.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is a suit by a British insurance corporation, other than life or mutual, for refund of income taxes paid for the years 1930, 1931, and 1932. It is based on an alleged error of the Commissioner of Internal Revenue in limiting deductions for British income taxes paid to an amount not in excess of that resulting from applying the British tax rate to the income of plaintiff from sources within the United States.

The question is whether such a maximum limit of the allowance for deduction is proper under the applicable statute.

Pertinent parts of the statutes and regulations involved are set out in the footnote.[1]

Plaintiff, an insurance company, other than life or mutual, conducts an insurance business in various countries and is affiliated with twenty-two other companies which also engage in insurance business in different parts of the world. The principal office of the group is in London, England.

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[1] Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally*.—Taxes paid or accrued within the taxable year, except—

* * * * *

(2) so much of the income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit against the tax under section 131;

* * * * *

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

* * * * *

(b) *Net income from sources in United States*.—From the items of gross income specified in subsection (a) of this section there shall be deducted the expenses, losses, and other deductions *properly* apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. [Italics supplied.]

* * * * *

SEC. 232 (*Supplement I*). DEDUCTIONS.

In the case of a foreign corporation the deductions shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in Section 119, under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

Regulations 74, promulgated under the Revenue Act of 1928:

ART. 680. *Apportionment of deductions*.—From the items specified in articles 671-676 as being derived specifically from sources within the United States there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any other expenses, losses, or deductions which can not definitely be allocated to some item or class of gross income. The remainder shall be included in full as net income from sources within the United States. The ratable part is based upon the ratio of gross income from sources within the United States to the total gross income.

* * * * *

ART. 1111. *Deductions allowed foreign corporations*.—Foreign corporations are allowed the same deductions from their gross income arising from sources within the United States as are allowed to domestic corporations to the extent that such deductions are connected with such gross income. The proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 119 and articles 680-684. As to foreign life insurance companies, see article 977.

Plaintiff, for each of the years involved, filed United States income tax returns showing gross income from all sources and gross income from sources within the United States with supporting schedules, from which it computed a net taxable income for each year from sources within the United States. In arriving at the net taxable income, each of the returns reflected a deduction from gross income from sources within the United States for a part of the British income tax paid by the consolidated group. The United States Commissioner of Internal Revenue required that plaintiff file with its returns, in substantiation of its deductions for British income taxes, (1) a schedule of its gross income from all sources, reconciled with its annual financial statement, (2) a statement showing its net income from all sources subject to British income tax, and (3) a schedule of the consolidated assessment, showing the net taxable income or loss of each of the twenty-three companies in the consolidated group of which plaintiff is a member, together with all adjustments producing the consolidated tax liability, and (4) receipts for payment of the consolidated assessment. The plaintiff complied with these requirements.

[With some adjustments which are not now in controversy, the plaintiff determined its deduction for British income taxes in its United States returns by applying to the total British income taxes paid by it on income from all sources as a member of the consolidated group the percentage which its gross income from sources within the United States bore to its total gross income from all sources, the total British tax paid by plaintiff having been determined by applying to the total tax paid by the consolidated group the percentage which the taxed income of plaintiff bore to the taxed income of the consolidated group. The Commissioner's computation made use of the ratio method followed by plaintiff but in addition placed as a limitation thereon a maximum allowance determined by applying the British income tax rate of 25 percent to plaintiff's actual United States net taxable income without deduction for British income taxes and exclusive of United States income from which British tax was withheld at the source. Our

question is whether the limitation applied by the Commissioner was proper.]

Apparently the British permit an affiliated group operating in many countries to file a return showing aggregate net gains and losses as one taxpayer. In America while an affiliated group may file a consolidated return, each of the group remains a taxpayer. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319; *Swift & Co.* v. *United States*, 69 C. Cls. 171, 38 F. (2d) 365.

It seems proper that some limitation should be placed upon the amount of foreign taxes paid by a member of a consolidated group which that member may deduct from income received from sources within the United States. Otherwise it is conceivable that there might be a considerable income from operations in the United States and yet the aggregate net gains or losses from operations elsewhere be so great that unrestricted deductions applied on a strictly ratable basis might completely offset the United States income so that no tax whatever would be paid on such income. This would present the anomaly of a foreign corporation doing business in the United States and receiving a substantial income (profit) therefrom and yet paying no income tax whatever to the United States.

To prevent such a distortion of American income tax deductions the Commissioner of Internal Revenue, in construing Sections 119 and 232 of the Revenue Acts of 1928 and 1932, adopted what he called a "limitation" on deductions for British income taxes specifying that no deduction may be allowed in excess of the amount of income taxes that would have been actually due had the British rate been applied to income from sources within the United States. In the case at bar the limitation was made use of by applying the British tax rate of 25 percent to the United States income subject to United States tax instead of to the United States income which was subjected to the British tax under the British concept of taxable income. The plaintiff has not attempted to show what variation, if any, existed between the two incomes. In effect, what plaintiff argues is that the deduction should be unreservedly determined on the ratio basis without any limitation.

Plaintiff suggests that the Commissioner of Internal Revenue used a different method for calculating taxes for different years, depending on which one would secure the most money for the Government. This is incorrect. Exactly the same method was used for each of the six years 1928 to 1933 inclusive. For each of those years the ratio method of apportioning deductions was used. The overall British tax rate was used as a limitation for the years when the deductions claimed reached that amount. The British tax rate was applied not as a method but as a limitation. Of course, in any year when the deductions claimed were less than the British tax rate the limitation, though still in force, did not affect the result. The uniform method was used for all the years.

It is as if a dam has a spillway and the parties at interest have a contract that an owner below is entitled to all water that runs over the spillway. The fact that in certain years no water runs over the spillway doesn't alter the agreement. The same agreement prevails in each year even though the spillway is in actual use only in certain years. It is there and in effect for every year, regardless of whether any water actually runs over it.

Likewise here the limitation was made effective for all years even though the claim for deduction reached the level of the spillway or limitation only in certain years. To use another illustration, it operated in the same fashion as the governor on an engine, which prevents excessive speed without in any way interfering with the uniform principle upon which the engine operates.

Naturally the defendant did not allow as a deduction for any year a greater amount than its proportion of expenses and losses. Only when the claims reached unjust figures did the limitation, though in force at all times, affect the result.

Was the Commissioner justified in applying such a limitation? We think he was. Certainly some limitation should be placed on such deductions. Normally the simple ratio method might accomplish the proper result. But certainly, unless the statute is so worded as to leave him no discretion in the matter, it should not be construed as operating in

such a way as to eat up all United States income taxes regardless of the amount of income from operations within the United States.

The statute says:

> SEC. 119.
>
> * * * * *
>
> (b) * * * there shall be deducted the expenses, losses, and other deductions *properly* apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. [Italics supplied.]

The use of the term "properly" would seem to import some discretion and flexibility. The rules and regulations were to be prescribed by the Commissioner of Internal Revenue.

A similar provision to Section 119 (b) was first adopted in the Revenue Act of 1921. The Committee Report accompanying that bill indicated that on account of difficulties in definitely determining some of these matters broad discretion was lodged in the Commissioner of Internal Revenue in determining the proper allocations.

In *London & Lancashire Insurance Co.* v. *Commissioner*, 34 B. T. A. 295, the United States Board of Tax Appeals said (p. 298):

> The taxes paid to Great Britain by the petitioner on its income were measured by its income from all sources, which included both taxable income from United States sources, as well as tax-exempt income from United States sources and income from sources other than the United States. The United States statute, as we construe it, allows as a deduction in computing net income subject to tax only so much of the British taxes paid by the foreign insurance company as is properly allocable to the taxable gross income from sources in the United States.

See also *Universal Winding Co.* v. *Commissioner*, 39 B. T. A. 962.

A careful analysis of the opinion in *Third Scottish American Trust Co.* v. *United States*, 93 C. Cls. 160, 37 F. Supp. 279, which is relied upon by plaintiff, shows that it is inapplicable here. The plaintiff in that case was not an insurance

company which is subject to specific statutes. That fact was noted in the opinion. Besides, the question in that case was whether certain items should be wholly included or excluded from consideration in determining the proportion of income received by a British corporation from sources within the United States, and this limitation question was not presented.

The Commissioner has applied the limitation only to foreign insurance companies that are members of consolidated groups, in connection with which it is conceivable that ratable deductions might be as great as the total United States net income.

The limitation is reasonable. It permits a proper allocation of expenses, losses, and other deductions. It permits deductions to the extent of the full British tax rate, and it prevents a complete escape of all taxes on American income which might in some cases arise if unrestricted allocations of all claims and losses that might arise from operations by consolidated groups in many lands were allowed by way of a deduction. To allow in such cases complete escape from taxation even though there were otherwise a substantial United States net income would certainly not be a proper allocation of such expenses and losses.

The petition should be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

I am unable to concur in the majority opinion. The Commissioner of Internal Revenue has authority to make rules and regulations within the general scope of the Act which are addressed to and reasonably adapted to its enforcement, but he may not extend a statute or modify its meaning. *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *International Railway Co.* v. *Davidson*, 257 U. S. 506, 514; *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342; *St. Louis Refrigerating & Cold Storage Co.* v. *United States*, 95 C. Cls. 707. The regulation adopted by the Commissioner, which is quoted in a footnote to the majority opinion, was

a valid exercise of the power conferred on him to make regulations, but this regulation was not followed. In assessing these taxes the Commissioner placed a limitation on the deduction not placed by Congress nor provided for in the regulations. Even by regulation the Commissioner could not have denied to the plaintiff a deduction allowed by Congress. Certainly he cannot do so when his own regulations do not prescribe the limitation imposed. Congress has said the plaintiff is entitled to a certain deduction for these taxes; the Commissioner has no power to say the deduction shall be something else.

Madden, *Judge*, dissenting.

The statute, Revenue Act of 1928, Sec. 232 (Supplement I), as quoted in the opinion of the court, says:

> * * * the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 119, under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

The Section 119 referred to provides that:

> * * * there shall be deducted * * * a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. * * *

Article 680 of Regulations 74, authorized, as we have seen, by Section 232, and quoted in the opinion of the court, provides:

> * * * The ratable part is based upon the ratio of gross income from sources within the United States to total gross income.

This regulation, expressly authorized by the statute, was the applicable law, fitting plaintiff's situation quite exactly. For the years 1928, 1929, and 1933 the regulation was applied to plaintiff, and plaintiff's taxes were assessed and collected pursuant to it. For the years involved in this suit, computations were made upon the basis of the regula-

tion, but these computations were not used in assessing plaintiff's tax. Another computation, not mentioned in the statute or the regulation, was applied, viz: the so-called "limitation" by which there was applied to the United States taxable income of plaintiff the British tax rate. Plaintiff was then treated as if it had paid this amount of British tax attributable to its United States income.

The consequence of this departure from the regulation was to reduce plaintiff's allowable deduction from its income, and increase its tax. That this was the only purpose of the departure is shown by the fact that the Commissioner did not depart from the regulation for the years 1928, 1929, and 1933, which he had under consideration at the same time as the years here in question. For those years, the figures were such that adherence to the regulation produced a smaller allowable deduction and a larger tax than departure from it.

The defendant justifies this intermittent, but methodical, application or nonapplication of the regulation by pointing out that plaintiff is one of a group of affiliated companies which filed a joint return in Great Britain, and that, somehow, the making of profits or incurring of losses by other affiliates in other parts of the world would have an effect in a situation such as this, which ought to be minimized and which the Commissioner's action sought to minimize. No explanation is given of how this distortion would occur. If it is a real objection to the computation of taxes in accordance with the regulation, it was just as objectionable to plaintiff in the years 1928, 1929, and 1933, when it resulted in its having to pay more taxes, as it was to the Government in 1930, 1931, and 1932, when it would have, if not corrected by the Commissioner, reduced plaintiff's taxes below what it was compelled to pay.

The applicable regulation, which was the law, was the same for the six years. It should have been applied to the three years here in question, when it would have reduced plaintiff's taxes, just as it was applied to the other three years, when it increased them. I would permit plaintiff to recover.

CANAL DREDGING COMPANY v. THE UNITED STATES

[No. 43837. Decided March 1, 1943. Plaintiff's motion for new trial overruled May 3, 1943]

On the Proofs

Government contract; report to Congress under Special Jurisdictional Act; supplemental agreement not made under duress.—Where plaintiff entered into a contract with the Government, August 5, 1932, to do certain work in connection with the construction of the levee and navigation channel along the shores of Lake Okeechobee, Florida, including excavation; and where the specifications, profiles and other data relating to the work covered by said contract indicated that only 10 percent of the material was rock and plaintiff's bid was made on that assumption; and where on December 18, 1933, after plaintiff had been engaged in the work for some time it protested that the proportion of rock was much larger than 10 percent and upon plaintiff's request new and more accurate borings were made which showed that the material in the area where plaintiff was then working and in which plaintiff continued to work until its contract was terminated was 40 percent rock or material which could be classified as rock and was as difficult to excavate as rock; and where after notice was served on plaintiff February 21, 1934, directing plaintiff to discontinue operations and after conferences and negotiations, a supplemental agreement was entered into providing that plaintiff should be paid at the rate fixed in the contract for all work done up to that time and that plaintiff and its surety should be relieved from any further liability under the contract; and where under such agreement the plaintiff released defendant from any and all claims under the contract and supplemental agreement; it is *held* that plaintiff did not enter into the supplemental agreement under duress and that said supplemental agreement would be a complete bar to any recovery by plaintiff in a suit based on its contract.

Same; moral obligation of Government not passed on.—The Court expresses no opinion as to whether or not any moral obligation on the part of the defendant toward plaintiff arises out of the facts as found.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Mr. William M. Hall* and *King and King* were on the brief.

Mr. G. C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This case was referred to the Court of Claims under the Special Jurisdictional Act of February 10, 1938 (50 Stat. 703), as set forth in finding No. 2, and in accordance with the provisions of said act report was made to Congress as shown below by the opinion rendered March 1, 1943, by Judge Madden.

The court made special findings of fact as follows:

1. Plaintiff, Canal Dredging Company, is incorporated under the laws of the State of Illinois. It is the wholly owned subsidiary of Canal Construction Company, likewise an Illinois corporation, with its place of business in the city of Memphis, in the state of Tennessee. Plaintiff has no permanent office except that of the parent company. Plaintiff's officers, directors, and employees, the persons holding the same positions in the parent company, drew no salaries from plaintiff. Plaintiff had no books of account separate from those of the parent company.

2. Plaintiff filed its petition in this Court on February 10, 1938, pursuant to Private Act No. 64, 75th Congress, 1st Session, approved May 6, 1937, which reads as follows:

AN ACT

Conferring jurisdiction upon the United States Court of Claims to hear the claim of the Canal Dredging Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the United States Court of Claims to hear the claim of the Canal Dredging Company, a corporation under the laws of Illinois, with its principal office in the city of Memphis, Tennessee, and to determine and report to Congress the amount of additional compensation, if any, that said Canal Dredging Company may be justly entitled to for the excavation of rock exceeding the percentage represented in and by the specifications, profiles, and other data relating to the work and for its loss on account of its preparation for doing the work which it was to do in the State of Florida along the south shore

of Lake Okeechobee in the area known locally as South Bay between the Miami Canal and Bacom Point, under the contract entered into on the 5th day of August 1932 between the United States and itself designated as "Contract W–436–eng–3071," and supplemental agreement modifying the same between said parties, approved by the Chief of Engineers, United States Army, on the 13th day of July 1933, terminated by supplemental agreement entered into between said parties on the 14th day of June 1934, and for the best interests of the Government, because of the discovery of rock to be excavated in excess of that represented and contemplated as aforesaid, entitling said Canal Dredging Company to a material increase in the contract price, in order that the Government might construct said work by Government plant and hired labor, of a materially different design as more efficient for the purpose intended and at a less cost to the Government, to which said Canal Dredging Company consented.

SEC. 2. Such claim may be instituted at any time within one year after the passage of this Act, notwithstanding the lapse of time or any statute of limitations.

(50 Stat. 703)

This suit was instituted within less than six years from the time the contract in question was terminated and plaintiff's cause of action, if any, accrued.

3. August 5, 1932, plaintiff entered into a contract, W–436–eng–3071 with defendant which was represented by its contracting officer, Major B. C. Dunn, Corps of Engineers, U. S. Army, whereby plaintiff agreed to

* * * furnish all labor and materials, and perform all work required for constructing approximately 65,000 linear feet of levee and navigation channel along the south and east shore of Lake Okeechobee, Florida, involving the removal from the navigation channel and placing in levee of approximately 4,860,000 cubic yards of material, and the furnishing and placing of approximately 55,000 cubic yards of riprap along the berm of the levee between stations 1023 and 1173, for the consideration of eleven and sixty-two hundredths cents ($0.1162) per cubic yard of material for excavating the navigation channel and constructing the levee; and one dollar and fifty-four cents ($1.54) per cubic yard of material for furnishing and placing riprap along berm of levee, in strict accordance with the specifications.

schedules, and drawings, all of which are made a part hereof and designated as follows: Proposal No. 32–567. War Department, Maintenance and Improvement of existing river and harbor works (Caloosahatchee-Lake Okeechobee Drainage Areas, Fla.) and Funds Contributed for Improvement Caloosahatchee River and Lake Okeechobee Drainage Areas, Fla., Special Fund (Act of July 3, 1930). Specifications issued June 20, 1932.

The work shall be commenced within sixty (60) calendar days from the date of receipt by the contractor of notice to proceed, and shall be completed at the rate of progress specified in Paragraph 3 of the specifications.

Plaintiff's Exhibit No. 1, consisting of copies of the original contract, the specifications, the supplemental agreement dated July 13, 1933, and the final agreement and release dated June 14, 1934, is hereby made a part of these findings by reference.

4. Paragraph 3 of the Specifications provided:

3. *Commencement, prosecution and completion.*— The contractor will be required to commence work under the contract within 60 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work at an average rate of not less than 250,000 cubic yards of levee embankment per month during the first two months after the limiting date fixed for commencement, and at an average rate of not less than 300,000 cubic yards per month thereafter, and to complete it within the time determined by applying to the total quantity of material to be paid for actually placed in the levee under the contract the average monthly rates above stipulated, for the periods to which each rate applies; provided, that the contractor may be required so to conduct his work that at the end of each month during the life of the contract the total progress from the beginning of the contract to the end of that month shall be not less than that required by the above-stipulated rates of progress; provided further, that the quantity of material placed in levee in any one month shall in no case be less than 250,000 cubic yards; provided further, that no waiver by the contracting officer of any failure of the contractor to make in any month or series of months the rate of progress required by this paragraph shall be construed as relieving the contractor from his obligation to make up the deficiency in future months and to complete the entire work within the

time allowed by the contract. The work of placing the riprap paving shall be so conducted that it will be completed not later than the time fixed for completion of the levee embankment.

In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, the contractor shall pay to the Government as liquidated damages the sum of $100.00 for each calendar day of delay until the work is completed or accepted.

Article 4 of the contract provided:

Article 4. *Changed conditions.* — Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 9 of the contract provided, with reference to "Delays—Damages," that if the contractor refused or failed to prosecute the work or any part thereof with such diligence as to insure completion within the time specified in Article 1, or failed to complete the work within such time the Government might by written notice to the contractor terminate his right to proceed with the work or such part of the work as to which there had been delay. In that event the Government might take over the work and prosecute the same to completion and the contractor and his sureties were to be liable for any excess costs.

Article 15 of the contract provided:

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be

decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

5. The maps referred to in paragraph 6 of the Specifications are exemplified by plaintiff's Exhibit No. 2 and defendant's Exhibits Nos. 1–A, 1–B, and 1–C, the latter being considerably larger drawings of those depicted on sheets 13, 14, and 15 of plaintiff's exhibit No. 2, also known and designated as profiles.

6. Paragraphs 11, 12, 13, and 15 of the Specifications provided:

11. *Quantity of material.*—The total estimated quantities of material necessary to be excavated and placed in levee (in place in levee embankment gross cross-section) to complete the work described in paragraph 2, are as follows:

	Cubic yards
Muck	1, 804, 000
Sand and shell	170, 500
Rock (variable)	198, 600
Marl	2, 686, 900
Approximate total	4, 860, 000
Rock riprap, in place	55, 000

These quantities are approximations only, compiled for the convenience of the bidders, and are based on the materials developed by the borings on Sheets 13, 14, and 15 of maps referred to in paragraph 6. Bidders, however, are expected to make their own estimates as to quantities of the various classes of materials to be encountered and to make their bids accordingly. * * *

12. *Core borings.*—Core borings have been made at 500-foot intervals along the entire length of the proposed work, supplemented by probings on sections 100 feet apart; these borings and probings are shown on profile map, file No. 159–9236, sheets 13, 14, and 15, referred to in paragraph 6.

Scattered rock not disclosed by the core borings may be found in some localities.

Sample cores of the rock and dry samples of the other material have been taken and preserved, and these samples may be seen at the U. S. Engineer Sub-office at Clewiston, Florida. Prospective bidders are advised to

examine these samples and make their own estimate as to the difficulties attending the excavation of the various materials encountered, as the cost of excavation and placing in levee embankment shall include the cost of removal of all materials encountered. A log of each hole drilled may also be seen and examined. Samples of rock previously excavated may also be seen along the borrow pit.

13. *Character of materials.*—The material to be excavated is believed to be muck, sand, marl, shell; sand, marl and shell mixed, and rock. The rock which will be encountered is of a limestone formation in layers varying in thickness from a few inches to a couple of feet, in most cases overlying a marl formation. The texture of the rock varies from a rather porous and friable character to a denser and fairly tough character. It breaks up into fragments ranging from pebble size to one-man and two-man stone sizes. Some blasting will be necessary, but it is believed the greater portion of the rock encountered is susceptible of being excavated in its natural state by means of a dragline bucket; all as shown by core borings taken at 500-foot intervals and samples of core borings which are on display at the U. S. Engineer Sub-Office, Clewiston, Fla. (see par. 12); but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly. In the event that materials, structures, or obstacles of a materially different character are encountered during the progress of the work, and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of or less than the unit price bid by the contractor, the contracting officer in either alternative will then proceed in accordance with the provisions of article 4 of standard Government Form No. 23, or any authorized revision thereof. It is believed that practically all of the materials named above will be suitable for levee construction to the amount required. (See paragraphs 11, 16, and 25.)

15. *Navigation channel.*—The navigation channel shall be at least 6 feet deep below lake elevation +14.0 feet and at least 80 feet wide at that depth, with side slopes adjacent to levee berm not steeper than 1 foot vertical to 2 feet horizontal and on the lake side of the navigation channel not steeper than 1 vertical to 1 horizontal, and is to be constructed by excavating the material to be used in constructing the levee. It is anticipated that the amount of material required for the levee

will result in the excavation of a channel of much greater dimensions than those given above, but should it occur at any location that the requirements of the levee do not give a channel of the required width and depth, such additional excavation shall be done by the contractor and such excess material shall be wasted as directed by the contracting officer. Any material excavated and wasted under this proviso, and within the side slopes previously specified, will be measured by place measurement and will be paid for at the price bid for material in place in levee embankment. (See par. 5, Payments.)

7. The situs of the project was along the east and south shores of Lake Okeechobee, a large inland fresh water lake in the State of Florida. The town of Clewiston is located on the south shore of Lake Okeechobee near the site of the work. The Government had established a U. S. Engineer Office at Clewiston where, prior to the advertisement for bids its engineers had made surveys, core borings and probings along the east and south shores of the lake where the channel was to be dredged and the levee constructed. However the levee, as finally located, diverged at several points from the original location and also in at least two places, from the location of the core borings as shown on the drawings.

The data, drawings, maps, core borings, probings and logs thereof were kept at the U. S. Engineer office at Clewistown on display and were available and accessible to the plaintiff and all other bidders on the project, and they were so notified.

Between the date of the advertisement for bids and the date of awarding of the contract, plaintiff also made some probings in the lake where the work was to be done.

8. The parent company, Canal Construction Company, held title to all equipment, but was not authorized to do business in the State of Florida. Plaintiff was organized for the purpose of working on projects in Florida and was authorized to do business in that state.

9. Prior to the commencement of work on the contract, Canal Construction Company adopted a formal resolution, July 11, 1932, pursuant to which it made available to plaintiff the equipment to be used on the work, and the equip-

ment was turned over to plaintiff on a stipulated rental basis. See copy of resolution and bookkeeping entries, pages 16–22, of defendant's Exhibit 23, made a part hereof by reference.

10. Paragraph 37 of the specifications provided:

> 37. *Plant.*—The contractor agrees to place on the job sufficient plant of size suitable to meet the requirements of the work. Plant shall be kept at all times in condition for efficient work, and subject to the inspection of the contracting officer. It is understood that award of this contract shall not be construed as a guaranty by the United States that plant listed in statement of contractor for use on this contract is adequate for the performance of the work.
>
> No change in the plant employed on the work, which would have the effect of decreasing its capacity below the capacity of the plant named in the bid, shall be made except by written permission of the contracting officer. The measure of the "capacity of the plant" shall be its actual performance on the work to which these specifications apply.

Plaintiff submitted with its bid the following list of equipment with which to perform the work:

Name	Kind	Capacity
Monighan	Drag	4
Do	do	3
P & H	do	3½
Vulcan	Dipper	2
American	do	2½
P & H	Drag	2½

Part of plaintiff's plant had to be brought to the project knocked down, and had to be reassembled and overhauled to meet the requirements of the project, with the exception of one dragline which plaintiff had previously rented to the defendant and which was at the site of the work.

11. Plaintiff was given notice to proceed on October 5, 1932. It had, however, upon its own request, begun work on the project in August 1932.

12. Up until July 1933, substantially all of the material excavated and placed by plaintiff consisted of muck, which plaintiff had removed for a distance of several miles, and in the excavation of which substantial compliance was made with the progress schedule. The harder materials, marl and

rock, lay below the muck covering. It was found, however, that the core of the levee required harder materials, as the muck tended to subside. Thereupon plaintiff and the defendant entered into a supplemental contract dated July 13, 1933, whereby the defendant agreed to remove the muck and waste it and plaintiff agreed to excavate and place the harder material which lay below the muck, and the price was raised from 11.62 cents per cubic yard to 15 cents per cubic yard.

13. Upon the making of the supplemental contract, plaintiff proceeded to convert its floating clamshell dredges into dipper dredges and to substitute for the floating dipper dredges a short boom dragline and a hydraulic dredge. The making of these changes required approximately 4 months for one dredge and approximately a month for another. During this period plaintiff failed materially to excavate and place the cubic yardage of materials prescribed by the contract, and the defendant orally called plaintiff's attention to its failure so to do. October 14, 1933, the contracting officer wrote plaintiff as follows:

> Having reference to your Contract No. 436 Eng. 3071, dated August 5, 1932, your attention is hereby called to the unsatisfactory progress being made on this contract.
>
> Pargraph 3 of the specifications, "Commencement, prosecution, and completion," prescribes an average rate of not less than 300,000 cubic yards in place in the levee embankment per month. Your average progress, as shown by the records of this office, since August 15, 1932, to September 30, 1933, shows a rate of 133,878 cubic yards per month. On September 30, 1933, your rate of progress was deficient by an amount of 956,284 cubic yards, or a percent of 32.98 behind your schedule.
>
> In view of the above, you are hereby directed to place the necessary plant and equipment on the work in order to bring your progress up to the prescribed rate by November 1, 1933. If on November 1, 1933, your rate of progress was deficient by an amount of 956,284 office will proceed as provided in Article 9 of your contract.

Plaintiff replied to this letter under date of October 28, 1933, as follows:

> Responding to your letter of October 14th, we have to say that, while we do not agree that the present situ-

ation of our work would warrant procedure under Article 9 of the contract, we have been working diligently both before and since the receipt of your letter, to provide additional plant and equipment on our work and we have now arranged for the following additional plant:

[describing 12″, 16″, and 10″ dredges]

We expect to have above-mentioned additional equipment on the job and working by November 20th.

We beg further to inform you that we have had negotiations for another large dredge which have not been successful to date, but which we expect to continue and which we hope will ultimately succeed in getting this dredge on our work.

* * * * *

We assure you that we shall push to the limit all units employed and get others in their places if they do not perform as promised and contemplated, and will carry out our contract if not interfered with and if permitted to do so.

14. Plaintiff placed on the work additional equipment, as follows:

November 13, 1933, dragline No. 6; December 1, 1933, the dredge *Alice* and the dredge *Culebra*, both of which were hydraulic dredges.

15. Plaintiff in a letter to the contracting officer dated December 18, 1933, for the first time complained in writing of an excess quantity of rock material, as follows:

We invite your attention to the fact that the drawings and specifications on the above styled project contemplate the removal under the original contract and supplement thereto, approximately two hundred ninety-six thousand (296,000) yards of rock material. We wish to advise you that although we have completed less than five per cent (5%) of the above styled project we have excavated to date approximately five hundred fifty thousand (550,000) yards of rock material.

Inasmuch therefore, as the conditions are materially different from those shown by the drawings and specifications we therefore under Article Four of the above contract, respectfully call this to your attention and respectfully suggest that the contract be adjusted to meet the changed conditions.

We suggest that a reclassification of the unexcavated

portion of the above project be made and at the same time be determined at our expense.

We would respectfully suggest that the reclassification be made over the unexcavated portion by core borings, to be made at intervals two hundred fifty (250) feet, and that the borings be made under the direction and supervision of your representatives agreeable to us, but that we have a representative on the borings at all times and that in case of disputes that the same be settled by the District Engineer, subject to the usual privilege of appeal.

16. Plaintiff also wrote the District Engineer on December 19, 1933, as follows:

Your attention is invited to the lack of progress on the above styled project.

In our opinion this is due to two causes: firstly the lack of progress by the United States in stripping muck as provided by the supplement agreement, which lack of progress on the part of the United States has caused to date a shutdown of three of our plants at various times; secondly, the amount of rock that we have encountered on the project that is not indicated on the profile has materially slowed down our operations.

For the purpose of record and for that purpose alone, we are inviting your attention to the above set forth matters.

17. December 19, 1933, the District Engineer wrote plaintiff as follows:

Having reference to letter from this office dated October 14, 1933, relative to the progress being made under contract bearing symbol No. W-436 Eng. 3071, and your reply thereto dated October 28, 1933, your attention is again called to the unsatisfactory progress still being maintained on your contract.

In your letter dated October 28, 1933, and during a verbal discussion of this subject in this office on the same date you stated that arrangements were being made to place on the job by November 20, 1933, the following additional plant:

1. The 12-inch Diesel Dredge *Alice* with a capacity of 4,000 cubic yards per day or 100,000 cubic yards per month.

2. The 16-inch Steam Dredge *Culebra* with a capacity of 4,000 cubic yards per day or 100,000 cubic yards per month.

3. The 10-inch Diesel Dredge *Venetia* with a capacity of 2,000 cubic yards per day or 50,000 cubic yards per month.

You further stated that with the capacity of your present machines of 8,000 cubic yards per day or 200,000 cubic yards per month supplemented by the capacity of the 3 above-mentioned dredges you would have an operating capacity of 18,000 cubic yards per day or 450,000 cubic yards per month which last-named capacity of 450,000 cubic yards per month would give you an excess of 150,000 cubic yards per month over that prescribed by the specifications which would enable you to overcome your deficiency of approximately 1,000,000 cubic yards on that date and permit you to complete the contract within the prescribed time limit set by the specifications.

The records of this office show that on December 1, 1933, the Dredges *Alice* and *Culebra* arrived on the job and began operations. For the past 16 days the records of this office show that the average daily output for the Dredge *Alice* has been 2,100 cubic yards, and for the *Culebra* 1,600 cubic yards, or a combined total daily output for these two dredges of 3,700 cubic yards instead of the anticipated 8,000 cubic yards. Since December 1, 1933, the total combined output of all machines operating on this contract has been 7,076 cubic yards per day. The records further show that on December 16, 1933, your rate of progress was deficient by an amount of 1,403.874 cubic yards, or a percent of 38.27 behind schedule.

In view of the above, you are hereby directed to advise this office at the earliest practicable date what further steps you propose to take to bring your rate of progress up to that prescribed by the specifications and the earliest practicable date you expect this progress to be in conformity with that prescribed in paragraph 3 of the specifications.

18. December 20, 1933, the contracting officer wrote plaintiff disagreeing with plaintiff's statements relative to the amount of rock, and as to any material variation in materials as actually excavated from the description on pages 13, 14, 15 of profile drawings (plaintiff's exhibit No. 2), but stating that, in compliance with plaintiff's request a Government drill would be placed on that portion of the work south of Kreamer Island and a line of core holes bored at 250-foot intervals. Plaintiff was invited to have a representative present.

19. In accord with plaintiff's request in its letter of December 18, 1933, quoted in finding 15, additional core borings were made just ahead of plaintiff's operations and approximately on the line of the levee being constructed between stations 840 and 780 and between stations 724 and 715, and an isolated boring at station 695. These were called "dry" borings and were made by a more efficient method than the precontract borings made by the defendant. The making of these borings covered a period of several weeks, which period extended into the year 1934.

These samples of material were the subject of thorough examination by the defendant's inspectors and also by competent geologists employed by plaintiff, two of whom were present on the work when the borings were made. The reports of the geologists, which are in evidence, are those of Charles P. Berkey of Columbia University, associated with whom was Phillip L. Merritt, of Connecticut, dated March 1934 (plaintiff's exhibit No. 15); of Steward J. Lloyd of the University of Alabama, dated March 17, 1934 (plaintiff's exhibit No. 16); and of Edward B. Burwell, Jr., dated April 3, 1934 (defendant's exhibit No. 22), to each of which reference is made.

Berkey and Stewart, geologists employed by plaintiff, determined that in the area examined the percentage of rock amounted to 50%, while Burwell, the defendant's geologist, determined the amount to be about 40%.

20. February 21, 1934, the contracting officer wrote plaintiff as follows:

> Having reference to an oral discussion in this office this morning with your Mr. A. J. Shea, relative to the progress being made on your contract dated August 5, 1932, No. W-436 Eng. 3071, for the excavating of navigation channel and construction of levee along the south shore of Lake Okeechobee, Florida, you are informed as follows:
>
> Owing to the unsatisfactory progress which is being made on this contract, which has resulted in your being deficient by approximately 1,714,070 cubic yards on February 1, 1934, or a percentage of 41.7 behind schedule, and which fact clearly indicates the contract will not be completed within the specified time, you are directed to cease all operations, effective this date, on your contract be-

tween Stations 875 + 00 and 564 + 00. In this connection, this office is recommending to the Chief of Engineers that the portion of your contract between the points named above be taken over by the United States and prosecuted as provided for in Article 9 of your contract.

This letter was followed by a telegram from the contracting officer to plaintiff as follows:

Relet dated February twenty-first advising termination of a portion of your contract the time for protesting such action is extended until after conference next week.

21. March 9, 1934, plaintiff appealed to the Chief of Engineers from his order of February 21, 1934, in the following letter:

We are in receipt of a letter dated February 21st, 1934, from Major B. C. Dunn, District Engineer, and copy of same is hereto attached.

You will note that we are directed to cease all operations, under our contract for a certain portion of the work. The authority for such action is apparently Article Nine of our contract.

Pursuant to the above-styled contract we are seeking a review of the action of the District Engineer, and hereinafter set forth our reason for same.

The above-styled contract was entered into between the Canal Dredging Co. and the United States on the 5th day of August, A. D. 1932, for certain construction, which contract was subsequently amended on July 8th 1933, after vigorous protest on our part that the shrinkage of the muck core was far greater than indicated on the plans. Progress being somewhat ahead of schedule up to the time of our protest.

Alleged lack of performance on the above-styled project is due to the following causes:

A

Failure on the part of the District Engineer to recognize the amount of time required to revamp our plant to meet the changed conditions brought about by the modified contract, and the time necessary to assemble and install additional equipment. This was fully explained to the District Engineer by our letter of October 28th, 1933, which was in response to his letter of October 14th, 1933, in which the District Engineer threatened action under Article Nine of the Contract. Copy of our letter

of October 28, 1933, is hereto attached. The District Engineer has never questioned the correctness of the position taken by us in our letter of October 28th, 1933.

B

Lack of progress on the part of the United States in stripping muck, as provided by the contract. This lack of progress was called to the attention of the District Engineer, December 1st, 1933, and again on December 19th, 1933, in each instance by letter, copies of same are hereto attached. This lack of progress on the part of the United States, as set forth in the letters above mentioned, has occasioned much of the alleged delay. Particular attention is called to the fact that the plant of the United States to perform the muck stripping operations as per supplemental contract, did not arrive on the project until September 18th, 1933, and in the meantime the contractor had two machines shut down on account of the failure of the United States to begin the muck-stripping operation and another machine working on material which the contractor had stripped at its own expense. And this lack of performance on the part of the United States continues up to the present time.

C

Conditions are materially different from those shown by the drawings and specifications. That the conditions are materially different from those shown by the drawings and specifications was called to the attention of the District Engineer on December 18th, 1933, and again on December 19th, 1933, in each instance by letter. Copies of the letters are hereto attached. Subsequent investigation by the District Engineer by core borings has substantiated this fact. The contractor has in its possession a log of said core borings as made by the District Engineer, which will fully verify this statement.

In view of the foregoing, the contractor was more than surprised to receive the letter of February 21, 1934, terminating a portion of its contract in the unwarranted and arbitrary manner indicated; particularly since said letter of February 21, 1934, does not make any findings of fact as contemplated by the contract as to the reasons advanced for the alleged delay as set above, set forth (A, B, C).

However, if the letter of February 21st, 1934, is to be construed as findings of fact on the reasons advanced

for the alleged delay, and our protest on the classification, then this is an appeal therefrom and an immediate hearing is respectfully requested to the end that the letter of the District Engineer be rescinded and relief granted as contemplated by Article Four of the contract.

22. The District Engineer also decided adversely to plaintiff's position as to the percentage of rock encountered and plaintiff appealed from that decision to the Chief of Engineers on March 27, 1934.

The report of the District Engineer to the Chief of Engineers through the Division Engineer, stated that the result of the later drillings indicated that within the small area drilled the amount of material to be removed consisted of about 40% rock, whereas the original profiles, 500 feet away, gave only approximately 10% rock; that due to unsatisfactory progress of the work, plaintiff was directed to cease operations between stations 875 and 564, where only a small amount of work had been accomplished; that, in his opinion, plaintiff's difficulties were due to inadequate plant, improper supervision, and lack of experience in hydraulic work; that the materials encountered were not greatly different from those shown by the drawings and specifications over that portion of the levee in which plaintiff had worked north of Torry Island Road; that the percent of rock claimed, based on the recent small area bored, was not necessarily representative of the entire area involved, and should not be considered as the basis for a claim over the entire contract.

23. The Division Engineer, in his accompanying report to the Chief of Engineers, concluded that classification of material as "rock" is difficult and controversial; that there probably existed over an appreciable portion of the uncompleted work "rock" in excess of that shown on the drawings and specifications; that the proportion of "rock" to other material would be difficult to determine by borings or otherwise; that any reclassification of rock should be in accordance with the original samples; that if rock so reclassified was found in work done since December 10, 1933, to exceed quantities shown on the drawings, plaintiff was entitled to an adjustment in the unit price under paragraph 13 of the specifications and article 4 of the contract; that the unit price to be allowed should be

proportionate to relative percentages of rock in the original classification and reclassification, and determined by allowing 35 cents per cubic yard for rock; that the District Engineer was justified in directing plaintiff to cease operations between stations 875+0 and 564+0; that if all or a portion of the work should be eliminated from the contract, it would be preferable, if practicable, to terminate it by supplemental contract, thus relieving the surety, "in order that the section of levee may be changed to another smaller approved section, thus reducing materially the quantities and permitting the accomplishment of the work for less than the contract price if done by Government plant."

In his report the Division Engineer recommended:

(a) Termination of the entire contract under article 9 of the contract; (b) enter into a supplemental contract for one of the following proposals:

(1) Continue contract as is at increased unit price, proportionate to increase in amount of rock as determined by borings at 35 cents per cubic yard—increase of rock to be determined by the contracting officer after consideration of all pertinent data.

(2) Continue contract at present unit price of 15 cents with modification that the United States shall place material on line of levee between earth dikes prepared by plaintiff, with deduction of price. Also additional allowance to contractor as adjustment since his protest in accord with the specifications.

(3) Continue contract, eliminating from the contract uncompleted work south of Torry Island Road. Make additional allowance at new unit contract price for work done since protest as to classification, the United States to assume all cost of boring for reclassification of material.

(4) Eliminate uncompleted work south of Torry Island Road; continue contract on remaining work at existing contract price (15¢), the United States placing with pipe-line dredge or otherwise material to complete levee; make adjustment at increased unit price for work done since protest.

(5) Terminate entire contract, pay for all work done to date and make adjustment at increased unit price for work done since protest as to classifications.

24. Subsequent to these letters and reports, representatives of plaintiff and of the defendant held a series of conferences with the Chief of Engineers at Washington, covering a period of several days, upon plaintiff's appeal, in which a full and general discussion was had relating to the question of excess rock material, to the order directing plaintiff to discontinue work over a certain prescribed area, and to the adequacy of plaintiff's plant. Discussion also covered the question as to whether or not, if the work were to be stopped, the contract should be taken over by the defendant and finished at the expense of plaintiff and its surety, under article 9 of the contract, or whether plaintiff should be paid for the yardage placed and its responsibility cease.

The Chief of Engineers in making his decision on plaintiff's appeal determined to discontinue the contract, pay plaintiff for work performed at the contract price and construct a levee of different design, by the use of hired labor, and at less cost to the Government.

Accordingly, the office of the Chief of Engineers wrote the following letter on May 1, 1934:

OFFICE, CORPS OF ENGINEERS,
May 1, 1934.

To the DIVISION ENGINEER,
Gulf of Mexico Division,
New Orleans, La.

1. Careful consideration has been given to all the facts involved as presented in the foregoing letter and endorsements, as well as to those adduced at a series of conferences held in this office with the contractor and his representatives. The district engineer is hereby authorized to terminate this contract by mutual agreement.

2. In view of the fact that it is desired to construct a levee of radically different design than that prescribed in the contract, and one which will be more efficient for the purpose intended at probably a less cost, it is to the interest of the United States to terminate the existing contract. The contract should be terminated on the basis of payment to the contractor at contract price for all work which he had done for which payment is permissible under the terms of the contract. No payment may be included for mobilization or demobilization.

3. Supplemental agreement should include a para-

graph releasing the United States from any and all claims under the contract.

4. Release of retained percentages should be provided for in the supplemental agreement.

5. Supplemental agreement should be executed by the district engineer, the contractor, and his sureties, and submitted to this office for final approval.

By order of the Chief of Engineers:

J. S. BRAGDON,
Major, Corps of Engineers,
Chief, Finance Division.

25. The text of the supplemental agreement, terminating the contract, and releasing the contractor, was as follows:

This supplemental agreement, entered into this 14th day of June 1934, by and between The United States of America, hereinafter called the Government, represented by the contracting officer, executing this agreement, of the first part, and the Canal Dredging Company, a corporation organized and existing under the laws of the State of Illinois, of the City of Memphis State of Tennessee, hereinafter called the contractor, of the second part, witnesseth that:

Whereas, On the fifth day of August 1932 a contract numbered W-436-eng-3071 was entered into by and between the above-named parties for the following work along the south shore of Lake Okeechobee in the area known locally as South Bay, between the Miami Canal and Bacom Point:

(a) Excavating a navigation channel and placing in levee embankment 4,880,000 cubic yards of material at 11.62 cents per cubic yard between Stations 564+89.64 and 1221+07.74 of Division 2, Section 1;

(b) Furnishing and hand placing 55,000 cubic yards of riprap along the channel slopes at $1.54 per cubic yard between Stations 1023+00 and 1173+00, and

Whereas, Said contract was modified on the 13th day of July 1933, by supplemental agreement entered into by and between the above-named parties so as to provide for the placement of a certain additional quantity of material in the levee and an extension of time for the completion of the work, and

Whereas, Conditions were such that as of April 4, 1934, the contractor had placed in the levee only 2,633,-145 cubic yards of material, and

Whereas, It has been determined to be in the best interest of the Government to forthwith discontinue the construction of the levee in the manner provided for in

the contract aforesaid as modified by said supplemental agreement and to construct the levee by Government plant and hired labor of materially different design which will be more efficient for the purpose intended and at a less cost to the Government, and

Whereas, It has been found to be advantageous and in the best interests of both of the said parties hereto to terminate the contract aforesaid as modified by said supplemental agreement on the basis hereinafter stated.

Now, therefore, It is hereby mutually agreed by the parties hereto that the contract aforesaid as modified by said supplemental agreement is hereby terminated.

The Government agrees to pay the contractor the sum of $80,230.46 in full settlement for all retained percentages and yardage placed by him in accordance with the terms of the contract.

The contractor agrees to accept settlement on the above basis and hereby releases the Government from any and all claims under the contract and supplemental agreement aforesaid.

The Government hereby further agrees to release the contractor from the performance of any more or additional work under the contract and supplemental agreement aforesaid, and to release to the contractor all retained percentages upon the execution of this supplemental agreement.

This supplemental agreement shall be subject to the approval of the Chief of Engineers, U. S. Army.

In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

This agreement was signed by both parties and approved by the Chief of Engineers.

26. The materials in the area in question in their original condition consisted of a series of practically flat lying beds of lime mud, containing amounts of shale and sand, varying widely as to proportions of lime mud, clay, shale and sand over short ranges. Since their original deposit the entire formation has undergone compacting. The present compacted material in these beds, which includes all material except muck and sand is classified either as marl or rock. This classification is, as is pointed out hereinafter, not very enlightening for engineering purposes.

Certain beds have in part become indurated to limestone, varying from soft earthy limestone to hard massive limestone.

The limestone beds vary from a few inches to several feet in thickness and are erratic as to occurrence and degrees of hardness. A given bed may be limestone at one boring and marl at another located nearby. The soft rock is a poorly indurated, soft chalklike limestone. The harder rock comprises limestones varying in hardness from that of plaster of paris to hard massive limestone which rings when struck with a hammer. The term limestone is commonly used to designate the more or less hardened portions of the material, of high lime and shell content which have to be broken up to handle. The word marl is used to designate those portions which have not sufficiently hardened to make them difficult to handle by ordinary dredging or shoveling methods. High lime and heavy shell content are characteristic of the rock portion, whereas comparatively high clay content mixed with lime and fewer shells is characteristic of the marl portion.

Since both rock and marl are found in varying degrees of hardness and softness, the distinction between rock and marl tends to disappear. What one observer would classify as hard marl another might classify as soft rock, since there is no fixed place to draw the line, either in the science of geology or in the usages of engineers or lay excavators.

A more useful classification for the purpose of estimating the type of equipment and the amount of labor necessary to excavate these materials would be a simple statement as to the hardness or softness of specified proportions of the materials, and the relative difficulty of their excavation. To whatever extent well preserved core borings could be taken, they would furnish a good basis for a statement of hardness or softness of materials. The borings taken by the defendant before the invitation to bid, and on which the estimates given in the specifications as to the proportions of various materials were based, were not suitable for accurate estimates. They were bored "wet" and some of the softer rock and harder marl, though difficult to excavate when in place, disintegrated when broken and exposed to the water, and hence seemed, when recovered, to be less hard than they were when in place. The later borings, described in finding 19, were more accurate and formed a better basis for estimating the true nature of the materials.

27. Much of the area over which excavation and levee building had been carried on after July 1933, the date of the supplemental contract, was under water at the time. The materials excavated had been placed on the levee embankment and had become mixed with each other, and had been affected by action of the elements. It was, therefore, not practicable to tell by inspection the percentage of rock and the percentage of marl in the levee embankment. Nor was it possible to determine the percentage of various materials in the area not yet excavated and not explored by the new borings.

28. The later borings mentioned in findings 19 and 26 having been made in an area from which the muck stratum had been excavated, and by a more careful method, provided a better sample of material and permitted a more expert examination. These borings indicated that there existed within the limited area explored by them, approximately 40% of rock or hard limestone material, after the removal of the muck, whereas the original specifications, profiles and other data indicated that there would be approximately 10% of rock material before the muck was removed.

29. Plaintiff's equipment with the additions made November 13 and December 1, 1933 (see finding 14), was adequate to excavate and place such materials as were described in the contract, within the scheduled time, with the exception of rock of greater thickness than 1½′, which required blasting.

30. Plaintiff's equipment did not have sufficient power, and therefore was inadequate to excavate and place the excess thick rock material encountered by plaintiff during December 1933, and referred to in plaintiff's letter to the defendant dated December 18, 1933, at the rate of progress required by the specifications.

31. After plaintiff's contract had been terminated, the defendant obtained and used three suction dredges on the work, one 22″ dredge, and two 20″ dredges. One of the dredges had big cutters operated by 450 to 700 hp. and also a rock type cutter specially designed for the purpose. With this equipment the defendant completed the work without blasting, except at one point.

32. From December 1933, when plaintiff protested that there was an excess of rock, to June 1934, when the contract

was terminated, plaintiff excavated approximately 500,000 cubic yards of material, for which excavation plaintiff has been paid by defendant at the rate of 15 cents per cubic yard.

Of these 500,000 cubic yards, 40 percent, or 200,000 cubic yards of material, was as difficult to excavate as rock, and might, not inaccurately, have been classified as rock.

The reasonable price per cubic yard for excavation of rock was 35 cents, which was 20 cents in excess of the price of 15 cents per cubic yard which plaintiff was paid.

If plaintiff were paid the extra 20 cents per yard for the 200,000 yards, which was as hard to excavate as rock, the additional payment would be $40,000.

33. One part of plaintiff's loss on account of its preparation expense at the beginning of the work, including transportation of equipment, building of temporary buildings, and similar items, not absorbed by the work performed and paid for, was $17,972.93. The following finding deals with another part of plaintiff's loss on preparation expense.

34. The dredge *Broward* at the commencement of plaintiff's operations was dismantled and rebuilt with new parts and changed from a dragline to a clamshell machine at a cost to plaintiff of $18,196.43. The loss on the machine not absorbed by the work performed is $6,192.40. When the supplemental agreement was made in July 1933, plaintiff again changed the machine into a dipper dredge at a cost to it of $10,716.18. The loss on this change not absorbed by the work performed is $2,141.59.

Dredge No. 3 at the commencement of plaintiff's operations was dismantled and rebuilt with many new parts at a cost to plaintiff of $6,383.37, and made into a clamshell machine. The loss on this operation not absorbed by the work performed is $2,172.31. In July 1933, when the supplemental agreement was made, the dredge was changed from a clamshell into a dipper dredge at a cost to plaintiff of $1,072.64. The loss on this operation not absorbed by the work performed is $214.36.

The sum of the items of $2,141.59 and $214.36 given in the two paragraphs above is $2,355.95. This amount also constitutes preparation expenses. Added to $17,972.93, the amount shown in finding 33, this makes a total preparation expense of $20,328.88.

35. Plaintiff had practically exhausted its financial resources and therefore deemed it advisable to accept the approximately $80,000 which the defendant paid it, for work already done, at the time of the termination of the contract in June 1934, and be relieved of further responsibility, rather than risk the loss of this entire amount if the Government should take over and complete the work at the expense of plaintiff and its surety.

It is not proved that plaintiff informed the defendant of its financial situation or that the defendant had knowledge of it, or gave consideration to it, at the time of the termination of the contract.

The defendant's agents acted in good faith and according to their honest views of the public interest and the provisions of the contract, in bringing about the termination of plaintiff's contract.

Plaintiff's consent to the supplemental agreement terminating the contract was not obtained by duress.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff filed its petition here pursuant to a special act of Congress, which Act is quoted in finding 2. The questions submitted to the court by Congress are answered in the foregoing special findings. In brief, the findings show the following:

The specifications, profiles, and other data relating to the work covered by plaintiff's contract indicated that only 10 percent of the material to be excavated was rock. Plaintiff made its bid on the assumption that this figure of 10 percent was substantially correct. On December 18, 1933, after plaintiff had been engaged in the work for some time, it protested that the proportion of rock to be excavated was much larger than 10 percent, and asked that new test borings be made. New borings were made which were more accurate than the former ones, and which showed that the material in the area where plaintiff was then working, and in which plaintiff worked until its contract was terminated, was 40 percent rock, or material which could be classified as rock and was as difficult to excavate as rock.

Plaintiff was far behind schedule in its work, and, after a notice served on plaintiff by the defendant on February 21,

1934, directing plaintiff to discontinue operations, there were negotiations by letter and in conference between plaintiff and the defendant's officers. These negotiations, which are shown in findings 20 to 24, were concluded by a supplemental agreement, quoted in finding 25, dated June 14, 1934, and executed by plaintiff and the defendant, providing that plaintiff should be paid at the rate fixed in the contract for all work which had been done up to that time and that it and its surety should be released from any further liability on the contract. It also provided:

> The contractor agrees to accept settlement on the above basis and hereby releases the Government from any and all claims under the contract and supplemental agreement aforesaid.

Plaintiff did not enter into the supplemental agreement of June 14, 1934, under duress, and that supplemental agreement would be a complete bar to any recovery by plaintiff in a suit based on its contract.

The reasonable price per cubic yard for the excavation of rock, or of material as hard to excavate as rock, at the time and place here involved was 35 cents. Plaintiff, after its protest of December 18, 1933, excavated approximately 200,000 yards of such material, and was paid 15 cents a yard, or $30,000, for doing so. If it had been paid 35 cents a yard, it would have been paid $40,000 more than it was paid. Plaintiff's loss in preparation to perform the contract, i. e., so much of its expense of preparation properly attributable to this contract as was not absorbed by the work which it did and was paid for, amounted to $20,328.88.

We express no opinion as to whether or not any moral obligation on the part of the defendant toward plaintiff arises out of the facts which we have found.

Pursuant to Private Act No. 64, 75th Congress, 1st session, approved May 6, 1937, the foregoing findings and opinion are reported to Congress.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

DONALD K. MUMMA v. THE UNITED STATES

[No. 45338. Decided February 1, 1943]

On the Proofs

Pay and allowances; increased subsistence and rental allowance; Army Officer on active duty, with dependent mother; no deduction for insufficient quarters assigned; Ageton v. *United States, 95 C. Cls. 718, overruled.*—Where plaintiff, an unmarried officer in the U. S. Army, on active duty with the Civilian Conservation Corps from September 14, 1936, to September 13, 1937, inclusive, was assigned as quarters one room in a frame barracks which were shared by other officers and forestry foremen and which were the only quarters available; and where during the said period plaintiff's mother, a widow, was dependent upon him for her chief support, as shown by the evidence; and where plaintiff's claim for increased subsistence and rental allowance for said period by reason of a dependent mother was denied; it is *held* that plaintiff is entitled to recover the full allowance provided by law for the said period, without deduction therefrom of the value of the one room occupied by him in the officers' barracks. *Ageton* v. *United States*, 95 C. Cls. 718, is overruled.

Same.—The Act of June 10, 1922 (42 Stat. 625), section 6, as amended by the Act of May 31, 1924 (43 Stat. 250), provides that each commissioned officer below the rank of brigadier general or its equivalent, while on active duty or entitled to active duty pay, shall be entitled at all times to a money allowance for rental of quarters, with the exceptions of (1) an officer without dependents on field or sea duty and (2) an officer with or without dependents to whom there "is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank;" and where the plaintiff comes within neither of such exceptions; it is *held* that he is entitled to the money allowance.

Same; no deduction provided for in the statute.—In the Act of June 10, 1922, as amended by the Act of May 31, 1924 (43 Stat. 250), there is no provision for the reduction of the money allowance to which an officer is entitled under the act by the money value of any Government quarters occupied by such officer.

Same; no provision in statute for partial allotment of quarters.—The statute makes no provision for a partial allotment of quarters (except in circumstances not pertinent to the instant case); and in the absence of a full allotment provision is made for payment only in money, without deduction therefrom.

The Reporter's statement of the case:

Mr. Donald S. Caruthers for the plaintiff. *Mr. E. W. Mollohan, Jr.* was on the brief.

Mr. J. M. Friedman, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Donald K. Mumma, was called to active duty with the United States Army and assigned to the Civilian Conservation Corps for the period of time beginning November 9, 1933, and ending November 8, 1934. He was again called to active duty on May 6, 1935, and served until September 13, 1937. These assignments were served with the rank of Captain. There were other periods of active duty with the United States Army with assignments other than the Civilian Conservation Corps.

2. Captain Mumma was assigned to the Civilian Conservation Corps Camp at Canajoharie, New York, from May 1935 to September 1935, being furnished one small room for quarters. From September 1935 until September 1937, Captain Mumma was assigned to the Civilian Conservation Corps Camp at Livingstonville, New York, Camp S–119, at which camp he was furnished one room about ten feet by fifteen feet in a frame barracks approximately sixty feet by twenty feet. The barracks were shared by other officers and forestry foremen and were the only quarters available.

3. From May 6, 1935, to September 13, 1937, Captain Mumma served approximately twenty-eight months on active duty with the United States Army assigned to the Civilian Conservation Corps and entered a claim for increased subsistence and rental allowance for twelve months thereof (from September 14, 1936, to September 13, 1937), by reason of a dependent mother. This claim was denied on the ground that the supporting documents submitted by plaintiff did not establish that his mother was in fact dependent on him for her chief support.

4. Captain Mumma's father, Edward Leiby Mumma, died in 1933, leaving no estate to his wife, Mrs. Mary Keister Mumma.

5. Mrs. Mumma has three children, Donald K. Mumma, Samuel L. Mumma, Laura M. Doutrich. Donald K. Mumma is unmarried, Samuel L. Mumma is married and had two children, one now living, and Laura M. Doutrich is married and has two children.

6. Samuel L. Mumma has not contributed anything to his mother's support since 1923.

7. For several years prior to August 1936, Mrs. Mumma lived with her daughter, Mrs. Doutrich, in Harrisburg, Pennsylvania. Mrs. Mumma had assisted her daughter in the care of her two children in exchange for a place to live, and her son, Donald K. Mumma, had provided her with money, amounting to approximately $25 a month prior to May 1935 and about $550 for the period from May 1935 to August 1936 for her necessities of life. During the latter part of 1935, and during 1936, it became necessary for Captain Mumma to contribute to the support of his sister, Mrs. Doutrich, in addition to contributing to the support of his mother. Due to Mrs. Doutrich's domestic difficulties and curtailed income, she being then recently separated from her husband and unemployed and having only such an income as was derived from her estranged husband, she requested her brother, Donald K. Mumma, in addition to providing their mother with money, to provide her with a home.

8. In August 1936, Mrs. Mumma went to New York, with funds provided by her son, Donald K. Mumma, to establish a home for herself and her son, Donald. Mrs. Mumma boarded with a sister-in-law at 162 W. 54th Street, New York, New York, until an apartment was located and furnished at 63 W. 55th Street, New York, New York. From November of 1936 until August of 1937, Mrs. Mumma maintained this apartment which was rented in her name, the lease and rental receipts for same being evidence in this case, and the apartment being shared by herself and her son, Donald K. Mumma, whenever he was on leave.

9. Mrs. Mumma's necessary expenses were approximately $100 a month, consisting of $50 a month rent, approximately $30 for food, and in addition gas, electric, and telephone bills and other necessary incidentals. Captain Mumma contrib-

uted approximately $100 a month to his mother for her support and maintenance during the time for which he makes claim for dependent allowance.

10. In September 1936, at the beginning of the time for which claim was made, Mrs. Mary K. Mumma was 67 years of age and unemployed, not being possessed of any stocks, bonds, real estate, funds, or any property from which she derived any income whatsoever.

11. During the period of time for which Captain Mumma makes claim, no one other than himself contributed to the support of his mother.

12. Mrs. Mary K. Mumma was supported entirely by her son, Donald K. Mumma, during the period for which he makes claim, and he provided a home and the necessities of life for her. No adequate quarters were available at the camp to which Captain Mumma was assigned wherein he could provide a home for his mother.

13. From August 1937 to May 1938, plaintiff lived with and supported his mother at Danbury, Conn. Thereafter plaintiff went to the Canal Zone, Panama, and Mrs. Mumma returned to live with her daughter, Mrs. Doutrich. Plaintiff has contributed about $25 a month to his mother's support since her return to live with her daughter. Since December 4, 1940, plaintiff has been on active duty with the Regular United States Army as a captain in the Air Corps.

14. During the period for which claim is made, plaintiff's mother was dependent upon him for her chief support.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover the rental allowance to which plaintiff alleges he is entitled on account of his dependent mother. The proof shows that she was dependent, and that plaintiff was her chief support, and he is therefore entitled to the allowance. The only question presented is whether or not there should be deducted therefrom the value of one room occupied by him in the officers' barracks.

In *Ageton* v. *United States*, 95 C. Cls., 718, the majority of the court held such deduction should be made.

Since I was counsel for the defendant in that case by virtue of my former office as Assistant Attorney General, I did not participate in that decision. Judge Green, retired but recalled to active service, wrote the opinion for the court, in which the Chief Justice concurred. Judge Jones wrote a separate concurring opinion and Judges Madden and Littleton dissented. For the first time the question is presented in a case in which I am qualified to participate.

I am of the opinion that the plaintiff is entitled to the full number of rooms given him by statute, without any deduction for the one occupied by him. The language of the statute is unusually plain and explicit. The first paragraph of section 6 of the Act of June 10, 1922, as amended by section 2 of the Act of May 31, 1924, 43 Stat. 250, reads as follows:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

That is explicit language—"Except as otherwise provided in the fourth paragraph of this section, each commissioned officer * * * shall be entitled at all times to a money allowance for rental of quarters."

What are the exceptions mentioned in the fourth paragraph referred to? They are (1) an officer without dependents on field or sea duty; and (2) an officer with or without dependents to whom there "is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank * * *." These are the only two exceptions. Plaintiff here comes within neither of them; he is not an officer without dependents, and he is not one with dependents to whom the number of rooms provided by law had been assigned.

The first paragraph provided that he "shall" be entitled to a money allowance for rental of quarters unless he came within one of these two exceptions. Since he did not come within them, he is entitled to the money allowance.

The intermediate paragraphs set out the number of rooms or the money allowance therefor to which plaintiff is entitled. Nowhere in the Act is it provided that the number of rooms or the money allowance therefor shall be reduced by the number of or the value of any Government quarters occupied by plaintiff. If Congress intended to make this deduction, it omitted to do so; but, on the contrary, it explicitly said that he was entitled to the money allowance provided for, with only two exceptions, within neither of which plaintiff comes. This court is without authority to make another exception, especially in view of the plain and unequivocal language that the plaintiff "shall be entitled at all times" to the money allowance specified.

There is not the slightest ambiguity in the language. There is, therefore, little warrant for resorting to the committee reports, but it is interesting to observe that the Committee on Military Affairs of the House of Representatives said that the legislation providing for rental allowance of officers had been much improved "by including and combining *all* the exclusionary provisions affecting rental allowance in a single paragraph." It further says that the section contains "the express grant of rental allowance, *certain and unconditional* in nature *except as conditioned by aforesaid exclusionary provisions of the fourth paragraph*." (Italics ours.) Finally, the committee says that the effect of the provision is to secure "to all officers drawing pay-period pay the corresponding rental allowance which the second section creates and which ceases to accrue only in the circumstances specified in the fourth paragraph thereof." H. R. No. 236, 68th Cong., 1st Sess.

It was the committee's purpose, it said, "to make clear the import and uniform the application" of the law relating to money allowance for rental of quarters. It seems to me that it undoubtedly did so, and that it left no room for so-called construction, and that it precludes this court from adding an exception to those specified by Congress or from deducting from the money allowance to which Congress said an officer "shall be entitled" any sum whatever. See Judge Madden's able dissenting opinion in *Ageton* v. *United States*, 95 C. Cls. 718, 724.

Judge Jones in his concurring opinion in the *Ageton* case concurs in the result because he thinks that "the value of the one room actually assigned and used should be treated as a partial allotment or part payment of the statutory obligation." But Congress has made no provision for a partial allotment, except in a case not pertinent here, and in the absence of a full allotment it has made provision for payment only in money. The officer, Congress says, "shall be entitled at all times to a money allowance for rental of quarters." That allowance was fixed at approximately $20 a room for the number of rooms to which he was entitled. No provision was made for any deduction therefrom. If it thought of a case such as this one, it did nothing about it. Whether or not it did think about it, we do not know, and, if it did not, what it would have done if it had, we do not know. But we do know that Congress thought that it was making an "express grant of rental allowance, certain and unconditional in nature except as conditioned by aforesaid exclusionary provisions of the fourth paragraph."

Ageton v. *United States*, 95 C. Cls. 718, is overruled.

Plaintiff is entitled to recover the full money allowance provided for by law from September 14, 1936, to September 13, 1937, both inclusive.

Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due in accordance with this opinion.

It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.
JONES, *Judge;* and WHALEY, *Chief Justice*, dissent.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $1,179.00, and upon plaintiff's motion for judgment, it was ordered April 5, 1943, that judgment for the plaintiff be entered in the sum of $1,179.00.

JESSE B. DUBOIS v. THE UNITED STATES

[No. 45443. Decided February 1, 1943]

On the Proofs

Pay and allowances; officer in Coast Artillery with dependent mother.—Following the decision in *Donald K. Mumma* v. *United States*, p. 261 *ante*, it is *held* that, where the dependency of plaintiff's mother is well-established, the plaintiff, an officer in the Coast Artillery, U. S. A., is entitled to recover for rental and subsistence allowances as provided by law for an officer of his rank and length of service, with dependents, for the periods involved in plaintiff's claim.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Jesse B. DuBois, was appointed second lieutenant, Coast Artillery Reserve, June 21, 1932, and accepted the appointment June 28, 1932. He was promoted to first lieutenant Coast Artillery Reserve, July 11, 1935, and accepted the appointment August 9, 1935. Plaintiff accepted reappointment as first lieutenant, Coast Artillery Reserve, effective July 11, 1940. Plaintiff was on active duty with the Civilian Conservation Corps from April 23, 1937, to April 22, 1938, and from November 20, 1938, to November 19, 1939. From March 10 to 23, 1940, plaintiff was on active duty in the United States Army at Fort Barrancas, Florida. He was promoted to captain in August 1941.

2. Plaintiff's father, Jesse DuBois, died intestate on April 10, 1937. The only property left by him consisted of his household furniture and effects, valued at approximately $600.00, and a life-insurance policy for $1,250.00, which named his wife, Mrs. Anna Bartless DuBois, plaintiff's mother, as beneficiary.

3. Plaintiff's mother was born November 22, 1886, and she

did not remarry after the death of plaintiff's father. During the period of the claim plaintiff had one brother, Henry W. DuBois, who married in August 1939, and one sister, Mary B. DuBois, who married in February 1940.

4. During the periods of this claim the only property owned by plaintiff's mother consisted of the furniture and household effects and life insurance left by her husband. She used the proceeds of the life insurance to pay the funeral and burial expenses of her husband, amounting to $625.20, and to pay for her own hospital and medical expenses incident to an operation, amounting to approximately $500.00, which were incurred prior to the death of her husband. The balance, amounting to approximately $100.00, was used for household expenses. The entire amount was expended prior to the commencement of plaintiff's claim.

5. During the periods of this claim, plaintiff's mother lived in the same apartment at Savannah, Georgia, which she had occupied since September 1930, and for which she paid rental ranging from $30.50 to $32.50 a month.

Except while attending school, plaintiff's sister until her marriage resided with her mother. She was not at any time gainfully employed, had no income, and paid nothing for room and board. Plaintiff's brother, Henry, also resided with his mother until his marriage and gave her $15 a month for room and board.

The household and living expenses of plaintiff's mother averaged from $80 to $150 a month and were paid with money contributed by plaintiff.

Plaintiff's mother did not at any time during the periods of this claim occupy Government quarters, and during the periods herein involved was dependent upon him for her chief support.

6. Plaintiff's mother was not gainfully employed during the periods of this claim, had no income and received no contributions except that received from her son, Henry, for room and board, and the regular monthly contributions of from $75 to $125 a month made by plaintiff for his mother's support.

7. Plaintiff claims rental and subsistence allowances because of a dependent mother for the five periods:

(1) April 23, 1937, to August 13, 1937.
(2) November 6, 1937, to April 22, 1938.
(3) November 20, 1938, to September 18, 1939.
(4) October 12, 1939, to November 19, 1939.
(5) March 10, 1940, to March 23, 1940.

During these five periods plaintiff received no rental allowance.

Plaintiff does not claim rental allowance for the two periods:

(6) August 14, 1937, to November 5, 1937.
(7) September 19, 1939, to October 11, 1939.

During these two periods plaintiff was assigned one room and was paid rental allowances for two rooms at the rate of $20 a room, and was credited concurrently with one subsistence allowance at the rate of 60 cents a day.

8. During the periods of his claim, with the exception of the period from March 10 to 23, 1940, plaintiff occupied quarters in temporary buildings in Civilian Conservation Camps. These buildings were constructed in panels and sections so that they could be knocked down and removed to other places where needed. The quarters assigned to and occupied by plaintiff in such temporary buildings consisted of one room, 10 feet square, furnished only with a bed and mattress by the Government. Plaintiff kept his clothes in his private wardrobe trunk, and bought a set of dresser drawers, small table, a reclining chair, and a radio, for which he paid approximately $75 from his private funds. In addition to the 10′ by 10′ room assigned to and occupied by plaintiff during the periods in question, plaintiff had, in conjunction with other officers and technical service personnel, the use of a living room in the front part of the temporary building, which was furnished by the officers and paid for from their private funds. He had also, with these officers and personnel, the use of other facilities such as bath, etc.

While at Fort Barrancas, from March 10 to 23, 1940, plaintiff occupied with another officer Government quarters consisting of one room, furnished with bed, table, and chest

of drawers, and bath. There is no evidence of determination by an administrative officer of adequacy of quarters occupied by the plaintiff.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case clearly show the plaintiff is the chief support of his mother. Dependency is well established.

Quarters furnished plaintiff in the temporary buildings in the Civilian Conservation Camps consisted of a room, a bed, and a mattress. Under no stretch of the imagination could this practically bare room be classified as adequate quarters. Nor should there be deducted from his rental allowance the value of the room at Fort Barrancas, although this was adequate for his individual occupancy. *Donald K. Mumma* v. *United States*, No. 45338, this day decided.

Plaintiff is entitled to recover rental and subsistence allowances as provided by law for an officer of his rank and length of service with dependents for the following periods:

(1) April 23, 1937, to August 13, 1937.
(2) November 6, 1937, to April 22, 1938.
(3) November 20, 1938, to September 18, 1939.
(4) October 12, 1939, to November 19, 1939.
(5) March 10, 1940, to March 23, 1940.

Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due under the foregoing special findings of fact and in accordance with this opinion.

It is so ordered.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $1,621.53, and upon plaintiff's motion for judgment, it was ordered April 5, 1943, that judgment for the plaintiff be entered in the sum of $1,621.53.

SEATRAIN LINES, INC. v. THE UNITED STATES

[No. 42607. Decided April 5, 1943]

On the Proofs

Government contract; breach; damages; failure by Congress to appropriate funds; fraud.—When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and when these terms and conditions are fully carried out and a contract in accordance therewith is entered into, such contract becomes a valid, binding agreement of the Government, and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation.

Same; charge of fraud unsupported.—The court cannot accept a mere charge of fraud in a brief, unsupported by pleading or evidence, as a basis for a finding of fact that there has been fraud and collusion in the negotiation of a contract.

Same; failure of Congress to appropriate funds not repudiation.—Where Congress in an appropriation act denied to a department funds for payment for services rendered to the Government under a valid contract, there was no attempt by Congress to repudiate the contract.

Same; failure to pay a breach of contract.—Failure by the Government to pay an obligation under a valid contract is a breach of the contract for which the Government is liable in damages.

Same; measure of damages.—The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained. *United States* v. *Behan*, 110 U. S. 338, 344.

The Reporter's statement of the case:

Mr. Ira A. Campbell for the plaintiff. *Kirlin, Campbell, Hickox, Keating & McGrann* were on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. Sidney J. Kaplan* and *J. Frank Staley* were on the briefs.

The court made special findings of fact as follows:

1. The plaintiff, Seatrain Lines, Inc., hereinafter referred to as "Seatrain Lines," is a corporation of the State of Delaware, created and organized June 13, 1931, with its principal office and place of business at 39 Broadway, New York City, State of New York.

At all times the president and managing directors have been and are citizens of the United States, and more than 75 percent of its capital stock has been and now is owned by citizens of the United States.

2. Railway Transports, Inc., hereinafter referred to as "Railway Transports," is a corporation of the State of New York, created and organized April 27, 1926. It was incorporated for the purpose of acquiring the interests and rights of Graham M. Brush in a certain application for patent on a vessel carrying loaded and empty freight cars and on port facilities therefor, which matured into United States Letters Patent No. 1,591,278, July 6, 1926, and for financing the development of plans and specifications, in accordance with the letters patent, for a new type of vessel, together with special terminal facilities therefor.

The authorized capital stock of Railway Transports was 500 shares of no par value, all of which was issued to Graham M. Brush in consideration of the transfer by him to Railway Transports of his rights under the letters patent. Graham M. Brush retained 375 shares and transferred 85 to Joseph Hodgson and 40 to Alfred G. Smith, who had advanced certain sums of money to assist in carrying on the patent development.

Various foreign patents, substantially duplicates of the United States patent, were granted Railway Transports on subsequent dates.

3. Over-Seas Railways, Inc., hereinafter referred to as "Over-Seas", was created and organized under the laws of the State of Delaware May 28, 1927, for the purpose of obtaining an exclusive license under the above-mentioned letters patent and applications therefor, owned by Railway Transports, and effecting the financing and construction of new ships, terminals, and loading facilities covered by the patent.

The authorized capital stock of Over-Seas was 7,500 shares of $100 par value, participating, cumulative 6 percent preferred and 11,250 shares of no par value common stock.

4. Immediately after the organization of Over-Seas the license agreement referred to was entered into between Railway Transports and Over-Seas. Thereupon Railway Trans-

ports, which then held all of the common stock of Over-Seas, transferred back to Over-Seas such common stock, with the understanding that Over-Seas would give one share thereof as a bonus with each share of its preferred stock sold, and would return to Railway Transports one share of common stock for each two shares of common stock so issued as a bonus.

Sixty-five hundred shares of Over-Seas' preferred stock were sold prior to October 27, 1927, and subsequently, in the early part of 1929, 975 additional shares of such stock were sold. This resulted in the issue of 7,475 shares of preferred and 11,212½ shares of common stock, of which 3,737½ shares were held by Railway Transports.

5. On October 11, 1928, Over-Seas caused to be organized under the laws of the Dominion of Canada Over-Seas Steamship Company, Ltd., hereinafter referred to as the "Canadian company," for the purpose of taking title on completion of the S. S. *Seatrain*, then on order and under construction at New Castle-upon-Tyne, England, and hereinafter mentioned, and giving to the British shipbuilder a statutory mortgage on the vessel.

All of the authorized capital stock of the Canadian company, 10,000 no-par-value shares, except five directors' qualifying shares, was issued to Over-Seas in consideration of the grant of a license to use the patent rights which Over-Seas had acquired from Railway Transports.

On October 14, 1928, the rights and title in and to S. S. *Seatrain* were transferred to the Canadian company, and on November 6, 1928, the vessel by charter party was let by the Canadian company to Over-Seas for one year from delivery of the vessel to the charterer by the builder at Wallsend, near New Castle-upon-Tyne, England.

Upon taking title to the vessel the Canadian company assumed obligations to Over-Seas equal to the amount paid by Over-Seas for the construction of the vessel, less the amount of the mortgage, payment of which was guaranteed by Over-Seas. Thereafter Over-Seas made all payments of interest and principal on the mortgage from its own funds and charged the Canadian company with such amounts. The charter hire was not paid by Over-Seas, but was merely

credited to the Canadian company, offsetting in part the amount owed by the Canadian company to Over-Seas for the advances made in payment for the vessel and for interest and principal on the mortgage.

The charter party was continued from the date of delivery of the vessel by the builder to December 3, 1931, when all of the assets and liabilities of Over-Seas, including the stock of the Canadian company were sold to Seatrain Lines.

The same charter arrangements were continued between the Canadian company and Seatrain Lines until the Canadian company was dissolved and liquidated February 29, 1932. Upon the dissolution of the Canadian company Seatrain Lines took title to the vessel after paying off the mortgage in full, and coincidentally transferred the vessel to American registry and renamed her *Seatrain New Orleans*.

On April 25, 1932, Seatrain Lines, by way of stock ownership acquired a railroad extending about 1½ miles along the New Jersey water front in the City of Hoboken serving 11 piers used by a number of trans-Atlantic and South American steamship lines and also the terminal at which is located the special loading apparatus for Seatrain vessels, the terminal facilities being built subsequent to the purchase of the road by Seatrain Lines.

6. On January 26, 1933, Seatrain Lines caused to be organized under the laws of the State of Delaware, Gulf Transit Corporation, with a capital stock of 100 shares of common stock having a par value of $100 per share. The entire authorized stock was issued to Seatrain Lines in consideration of the sale and transfer to Gulf Transit Corporation of the *Seatrain New Orleans* (ex S. S. *Seatrain*) and terminal facilities at Havana, Cuba, and at Belle Chasse, terminal in the Port of New Orleans, Louisiana.

7. On October 14, 1933, Over-Seas and Seatrain Lines were merged and consolidated into a single corporation by the name of Seatrain Lines, Inc., under the laws of the State of Delaware.

8. A copy of Letters Patent No. 1,591,278, July 6, 1926, is filed in this case and made part of these findings by reference. The patentee, Graham M. Brush, assigned his patent

rights to Railway Transports August 17, 1927, and they are now owned by Railway Transports.

9. Early in 1927 complete plans and specifications for the construction of a vessel and loading gear and equipment incorporating the distinctive features covered by Letters Patent No. 1,591,278 had been perfected, following which Brush obtained quotations from two of the more experienced American shipbuilders for the construction of the vessel. The quotations were in round numbers $1,350,000 and $1,500,000. Brush then took up with the United States Shipping Board (hereinafter referred to as "Shipping Board") and Todd Shipyards Corporation the matter of purchasing and converting an existing vessel into one incorporating the features covered by the letters patent. The estimated cost was $150,000 for a ten-year-old vessel and $675,000 for conversion, a total of $825,000. The Shipping Board advised Brush that the maximum amount it could lend in aid of construction or conversion was 50 percent of the American costs thereof. Brush then obtained from Danish, German, and English builders quotations for the construction of such a vessel. These quotations all closely approximated $650,000. The English yard offered to extend the time of payment of 75 percent of the contract price, the deferred payments to be secured by a statutory mortgage on the vessel.

After several estimates had been received and the cost of the ship approximately determined, together with the amount of necessary financing, Over-Seas was organized May 28, 1927, as set out in Finding 3. This corporation, on October 20, 1927, by resolution of its board of directors, authorized Brush to proceed to England to enter into negotiations for the construction of a vessel in accordance with the plans and specifications.

10. Brush went to England pursuant to the resolution of the board and entered into negotiations for construction of the vessel with Swan, Hunter & Wigham Richardson, Ltd., and Over-Seas in January 1928 appointed John M. Campbell & Son, of Glasgow, its representatives in connection with the construction and dispatch of the vessel to be build by Swan, Hunter & Wigham Richardson, Ltd. By the end of

January 1928 the terms of the building contract had been substantially agreed upon and John M. Campbell & Son authorized by Over-Seas to sign the contract and mortgage.

The builders required a statutory mortgage for deferred payments and this made it necessary for Over-Seas to form a Canadian corporation to receive title and execute the mortgage, and the Canadian corporation was formed October 11, 1928, as stated in Finding 5. The building contract was executed February 17, 1928, by Over-Seas and the builder, and the statutory mortgage was executed by the Canadian company November 14, 1928.

Some physical work on the vessel, aside from assembly, was done by the builder, Swan, Hunter & Wigham Richardson, Ltd., before the end of January 1928, and the keel was laid March 15, 1928. The vessel was completed and delivered November 14, 1928, to the Canadian company at New Castle-upon-Tyne. She was brought to the United States and placed in service between New Orleans and Havana, leaving the Belle Chasse (Louisiana) Terminal, which in the meantime had been constructed, on January 12, 1929, and thereafter continued in that service under the Canadian flag until February 29, 1932, when she was changed to American registry, renamed the S. S. *Seatrain New Orleans*, and placed under the American flag, and all of her sailings since that time have been under the American flag, in foreign trade, between the ports of New Orleans and Havana and between the ports of Havana and New York.

11. On April 26, 1929, the President of the United States informed the Postmaster General, the Secretary of Commerce, the Secretary of the Navy, and the chairman of the Shipping Board as follows:

> A number of problems arise under the Merchant Marine Act in relation to contracts which may be let over 10-year periods for carriage of the post mail.
>
> It is the intention of the law that these contracts should be used in such fashion as to upbuild and strengthen the merchant marine both for the present and the future. The Postmaster General feels that the question involves many problems which affect the Merchant Marine and upon which it is desirable that he should have considered advice of the other interested branches of the Government.

> I am, therefore, appointing a committee comprising the Secretary of Commerce, as Chairman, with a membership consisting of the Postmaster General, Chairman O'Connor of the Shipping Board, and yourself, this committee to consider and make recommendations bearing upon this question.
>
> I may mention that it would be desirable to appoint a subcommittee of experts in the various departments for the preparation of detailed material for submission to the Committee.

The committee so appointed met and organized May 4, 1929, designated itself the "Interdepartmental Ocean Mail Contract Committee" (hereinafter referred to as "Interdepartmental Committee"), and appointed the subcommittee suggested in the President's communication. The subcommittee met and organized May 9, 1929, designating itself "Interdepartmental Subcommittee of the President's Committee on Ocean Mail Contracts" (hereinafter referred to as "Subcommittee").

12. After consultation with officials of the Navy Department the president of Over-Seas, Graham M. Brush, formally applied, September 12, 1929, to the chairman of the Subcommittee for an ocean mail contract setting forth facts bearing upon the eligibility of the S. S. *Seatrain*, proposing to transfer it to American registry and construct an additional vessel for the ocean mail service similar in type, size, and speed to the S. S. *Seatrain*. On the same date he wrote the Secretary of the Navy, submitting blueprints of the general arrangement and midship section of the *Seatrain* type of vessel and inquiring as to its value as a naval auxiliary in time of national emergency.

The application was placed on file and on October 17, 1929, the acting Secretary of the Navy replied to Brush that "the peculiar construction of the vessel would be of particular value to the Navy, as regards ease of conversion, for use as an aircraft carrier," and that the "design is also well adapted to conversion to several types of auxiliary vessels which the Navy would require."

Graham M. Brush presented his case orally before the Subcommittee February 5, 1930, and news of this fact was published, among others, in the New York Times, the Journal of

Commerce, and the United States Daily, the following day.

13. An examiner for the Government looked into the matter of Over-Seas' proposal for an ocean mail contract from New Orleans to Havana. The examiner made his report to the Subcommittee February 11, 1930, and concluded "that the proposals of the Over-Seas Railways, Inc., are sound and their service has the best outlook toward permanency."

The Subcommittee recommended to the Interdepartmental Committee that the contract be advertised on the Over-Seas' proposal, with $2 a mile maximum, the building of a new vessel, with vessels in service capable of maintaining a speed of 14 knots.

Various meetings were held and negotiations by British with the Government officials continued. On January 31, 1931, Brush proposed two new vessels and altered his plans and designs of the vessels to conform to specifications from the Navy Department, which was investigating the details of the proposed vessels and advising Brush of its conclusions, favorable and unfavorable.

Further examination was made of the proposal and it was again considered by the Subcommittee. The Subcommittee reported favorably to the Interdepartmental Committee February 16, 1931, after passing a motion included in the report, as follows:

> It was moved and carried to recommend favorable consideration of the Over-Seas Railways, Inc., proposal, as amended under date of January 31, for the certification of a mail contract route from New Orleans to Havana. The proposal contemplates the building of two new vessels capable of carrying loaded railway equipment. The first to be built within two and the second within four years from the award of a mail contract. The number of sailings proposed is fifty sailings per year for the first two years and one hundred sailings per year thereafter.

The report also stated:

> The question of eligibility of the steamer *Seatrain* was referred to the Post Office Department solicitor, who confirmed the position of the applicant that the *Seatrain* could be made eligible for mail contract service by transferring it to American registry.

On June 5, 1931, the Secretary of Commerce forwarded a memorandum to the secretary of the Subcommittee, in part as follows:

> The following actions were taken today by the Interdepartmental Mail Contract Committee, all members being present:
> "1. *Over-Seas Railways*—
> In view of the present conditions, the economy program of the Government, and the desirability of using all funds that are available to help dispose of Shipping Board Lines, it was decided to postpone any action on this project for the present—though all opinions as to its soundness were favorable."

14. On June 25, 1931, Graham M. Brush wrote the Postmaster General amending the application for an ocean mail contract, in particular words as follows:

> We wish to file an amended application on the same terms and conditions as outlined in our application of January 31, 1931, and subsequently approved, except that the construction of both new vessels will be commenced immediately upon the granting of the Mail Contract and the necessary Government loans and be placed in operation not later than eighteen months thereafter.

15. On July 10, 1931, the Secretary of Commerce, Chairman of the Interdepartmental Committee, wrote the Postmaster General as follows:

> The majority of the members of the Interdepartmental Ocean Mail Contracts Committee voted today to recommend advertising a mail contract as suggested by the Overseas Railway, Inc., which case was approved in principle at the last formal meeting of the Committee. Secretary Adams was not available today but this action is taken since he approved the proposal in principle at the formal meeting of the Committee on June 5, the other members concurring in making the above recommendation.

16. On July 29, 1931, the Postmaster General communicated with the chairman of the Shipping Board by letter as follows:

> In compliance with Section 402 as amended of the Merchant Marine Act, 1928, I have the honor to certify to the United States Shipping Board the following

ocean mail route which should be established or operated for the carrying of mails of the United States as contemplated by the Act:

Route	Present annual volume of mail	Estimated 5-year volume of mail	Present annual volume of commerce		Estimated 5-year volume of commerce		Frequency per annum
			Imports	Exports	Imports	Exports	
			Tons	*Tons*	*Tons*	*Tons*	
New Orleans to Havana.	No mail is carried at present. Parcel-post matter may be carried.		168,718	159,717	1,027,821	975,080	50, with increase to 100 after the second year.

For the convenience of the Board in considering the matter, there is enclosed a copy of the report thereon of the Subcommittee of the Interdepartmental Mail Contract Committee.

17. Pursuant to a resolution of the Shipping Board August 11, 1931, the chairman thereof forwarded to the Postmaster General the following certification:

Replying to your letter of July 29, certifying a mail route from New Orleans to Havana, and enclosing copy of a report on the proposed route by the Subcommittee of the Interdepartmental Mail Contract Committee, we hereby make the following certification in compliance with the requirements of Sec. 403 of the Merchant Marine Act, 1928.

We recommend that the frequency of service on this route be 50 sailings per annum the first two years, and 100 sailings per annum thereafter.

For service at the beginning of the contract period we recommend the acceptance of vessels of the following description:

Type: Cargo vessels capable of carrying not less than 90 railroad cars.
Size: Not less than 6,500 gross tons.
Speed: Not less than 13 knots.

As replacements we recommend vessels of the following description:

Type: Cargo vessels capable of carrying not less than 90 railroad cars.
Size: Not less than 6,500 gross tons.
Speed: Not less than 14 knots.

> It is recommended, therefore, that the contract provide that not later than the end of the second year from the beginning of performance under the contract the contractor shall be required to place in service two new vessels of the type, size, and speed last above specified.
>
> While the certification made above would provide vessels which, in the judgment of this Board, will meet present requirements and also future requirements as they can now be reasonably foreseen, we nevertheless recommend that you consider whether the contract may not properly contain a provision that upon the mutual consent of the parties thereto, the contract may be amended providing for larger and/or faster ships.

The fact of this certification of the Shipping Board was published generally in the press the following day.

18. On August 11, 1931, Brush made what he termed a "preliminary" application to the Shipping Board "for a construction loan on two new vessels, to be built and operated on the Ocean Mail Route, New Orleans, La., to Havana, Cuba, certified by the Postmaster General to the United States Shipping Board on July 29, 1931." This application was made as president of Seatrain Lines, which had been incorporated June 13, 1931 (see Finding 1). Therein the type of the new vessels was described as "of normal hull design and excellent sea-going characteristics, with a capacity of ninety-five loaded railway cars carried on four decks."

The receipt of this application was acknowledged by the director of the Bureau of Construction of the Shipping Board August 19, 1931, as follows:

> Receipt is acknowledged of your preliminary application dated August 11, 1931, for a loan to aid in construction of two vessels to be operated on ocean mail route from New Orleans to Havana, Cuba.
>
> Before taking definite action on the subject application the Committee has notified other shipowners operating in the service covered by the proposed mail route of your application by letter, copy of which is enclosed herewith for your information.

Thereupon the Florida East Coast Railway Company, in behalf of the Florida East Coast Car Ferry Company, asked the Post Office Department and the Shipping Board

for an opportunity to participate in the proposed ocean mail service from New Orleans to Havana, as did also the Munson Steamship Line.

The Shipping Board invited statements from various shipping concerns that might be interested, promising a hearing for them on the application of Seatrain Lines for a construction loan. Following this invitation the Florida East Coast Ry. Co., the United Fruit Company, the New York & Cuba Mail Steamship Company, and the Munson Steamship Line, protested to the Post Office Department against the projected advertisement for bids, and to the Shipping Board against its certification and against granting of the loan to Seatrain Lines.

19. In the issues of September 7, 14, and 21, 1931, of newspapers in Boston, Mass., New York, N. Y., Philadelphia, Pa., Baltimore, Md., New Orleans, La. Charleston S. C., Norfolk, Va., Savannah, Ga., Jacksonville, Fla., Galveston, Tex., Houston, Tex., and Mobile, Ala., there appeared the following advertisement:

> POST OFFICE DEPARTMENT, Washington, D. C., August 26, 1931.—Proposals will be received at the office of the Second Assistant Postmaster General in the City of Washington until 12 o'clock noon October 5, 1931, for ocean mail service on the route hereinafter described, for a term of ten years beginning at a date optional with the contractor but not earlier than January 1, 1932, or later than one year from the date of the award of contract, pursuant to the Merchant Marine Act, 1928. The right is reserved to reject any or all bids.
>
> Route No. 56.—From New Orleans to Havana, including service to any other ports at which contractor's vessels may voluntarily call, on a schedule satisfactory to the Postmaster General of not less than fifty (50) trips per annum during the first two years and not more than one hundred (100) trips per annum during the remainder of the contract term (subject to other provisions of this advertisement for increase or decrease in frequency). The contractor will be required to operate in performance of service on this route cargo vessels of Class 5, capable of carrying not less than 90 railroad cars and of maintaining a speed of 13 knots at sea in ordinary weather, and of a gross registered tonnage of not less than 6,500 tons; provided that the contractor

shall have constructed in American shipyards two new cargo vessels of Class 5, capable of carrying not less than 90 railroad cars and of maintaining a speed of 14 knots at sea in ordinary weather, and of a gross registered tonnage of not less than 6,500 tons, such new vessels to be placed in service as soon as practicable but not later than the end of the second year of the contract term. The contractor and the Postmaster General may agree upon the operation of other vessels of any class. Classifications of vessels on this route are based upon speed without regard to tonnage. Bond required with bid, $5,000. The accepted bidder will be required to execute a contract with bond of $200,000. The Postmaster General and the contractor may agree upon the construction and/or operation of higher or lower class vessels and for a greater or smaller number of voyages than those specified. By agreement of the contractor and the Postmaster General, any vessels constructed in fulfillment of the contractor's obligation under this advertisement may be operated on any other American foreign trade or ocean mail route, the mail pay for any such operation to be governed by the authorization of service on the route over which the vessel is operated. In the event of default by the contractor with respect to any of the provisions of the contract, the Postmaster General may impose fines or other penalties, or may annul said contract. Bids submitted in response to this advertisement shall be subject to any legislation that may be enacted by Congress before the award of contract with respect to the acceptance of proposals for service under the Merchant Marine Act, 1928. Detailed specifications and proposal forms may be obtained from the Second Assistant Postmaster General, Washington, D. C.—Walter F. Brown, Postmaster General.

The detailed specifications and proposal forms referred to in the advertisement contained nothing in respect to the design or structure of the vessels not contained in the advertisement.

The vessels described in the advertisement with appropriate terminal facilities could have been constructed by a competent and responsible bidder in time to operate under the conditions stipulated without infringing United States Letters Patent No. 1,591,278 of July 6, 1926.

20. On September 16, 1931, the Shipping Board invited the New York & Cuba Mail S. S. Co., the Florida East

Coast Ry. Co., the American Sugar Transit Corporation, the United Fruit Co., and the Munson S. S. Line to attend a designated hearing before the Shipping Board on the application by Seatrain Lines for a loan from the Construction Loan Fund.

The hearing was held September 22, 1931, as designated, at which appeared representatives of the American Steamship Owners Association, of Munson S. S. Co., of United Fruit Co., of Florida East Coast Car Ferry Co., of Peninsular & Occidental Steamship Company, of New York & Cuba Mail S. S. Co., of the Ward Lines, of the Board of Port Commissioners, Port of New Orleans, and of Seatrain Lines, all of whom were given an opportunity to be heard.

21. Under date of October 3, 1931, Seatrain Lines submitted a bid for ocean mail service in accordance with the advertisement. The bid was the only one received.

On October 14, 1931, the Florida East Coast Car Ferry Co. protested to the Postmaster General against award of the contract to Seatrain Lines. The Postmaster General inquired of the Florida East Coast Car Ferry Co. if, in the event further bids were invited, the Florida East Coast Car Ferry Co. would bid on the specifications theretofore adopted. The Florida East Coast Car Ferry Co. replied October 24, 1931, that it was unable to bid on the projected route owing to the fact that its application before the Interstate Commerce Commission, opposed by Seatrain Lines, for approval of operating a New Orleans-Havana car-ferry line, had not been passed upon by the commission. The application was pending until October 17, 1932, when it was decided by the commission in favor of the applicant and the Florida East Coast Car Ferry Co. was allowed to operate a car-ferry service between New Orleans and Havana. I. C. C. docket No. 24119.

On October 31, 1931, the acting second assistant Postmaster General, pursuant to approval by the Postmaster General, issued the following order:

> The proposal of the Seatrain Lines, Inc., of 11 Broadway, New York, N. Y., under the advertisement of August 26, 1931, for ocean mail service on Route No. 56, from New Orleans to Havana, as described in the advertisement, for a term of ten years beginning at a date op-

tional with the contractor but not earlier than January 1, 1932, or later than one year from the date of the award of contract, is accepted for vessels of the classes that may be authorized, at the following rates: for vessels of Class 6, $2.50 per nautical mile; for vessels of Class 5, $4.00 per nautical mile; for vessels of Class 4, $6.00 per nautical mile, and for vessels of Class 3, $8.00 per nautical mile; contract to be executed accordingly.

And the Seatrain Lines was, on October 31, 1931, duly notified of the acceptance of its bid.

22. On August 13, 1931, the chairman of the Shipping Board Committee on Construction Loans submitted to the Chief of Naval Operations, Navy Department, the question of the usefulness of the proposed vessels to the United States in time of national emergency.

The question was considered in the Navy Department and conferences had with representatives of the Shipping Board, of the Seatrain Lines, and of an interested shipbuilder. The Navy officials offered substantial objections to the usefulness of the proposed vessels as naval auxiliaries. The president of Seatrain Lines expressed his desire to redesign the vessels to conform to Navy requirements and after many interchanges of ideas the design finally worked out was accepted by the Chief of Naval Operations and the Secretary of the Navy.

23. On August 11, 1931, Seatrain Lines forwarded to Bethlehem Shipbuilding Corporation, Federal Shipbuilding & Dry Dock Company, Newport News Shipbuilding & Dry Dock Company, New York Shipbuilding Company, and Sun Shipbuilding & Dry Dock Company, plans and specifications for the construction of two steel, ocean-going, car-carrying vessels, capable of transporting 90 loaded freight cars, inviting quotations on the work, after examination by the bidders of the plans and specifications and an inspection of the S. S. *Seatrain*, and advising further that bids would be received and opened at the New York office of Seatrain Lines, at 2:30 p. m., September 8, 1931. In response to the invitation bids were submitted and opened, at the time and place mentioned, in the presence of representatives of the Maintenance and Repair Department and the office of the General Comptroller of the United States Shipping Board

Merchant Fleet Corporation, and of the several bidders. The bids for the construction of the two vessels were as follows:

Sun Shipbuilding & Dry Dock Co	$2,968,000
N. Y. Shipbuilding Co	2,995,000
Newport News Shipbuilding & Dry Dock Co	3,500,000
Bethlehem Shipbuilding Corp	3,534,000
Federal Shipbuilding & Dry Dock Co	3,586,000

24. On September 26, 1931, the assistant director of the Bureau of Construction of the Shipping Board wrote Seatrain Lines as follows:

> Reference is made to your preliminary application, dated August 11, 1931, for loan from the construction loan fund to aid in the construction of two vessels, similar to your S. S. *Seatrain*, for operation in performance of ocean-mail-contract service between New Orleans, La., and Havana, Cuba.
>
> The Committee has considered your application for loan together with the data and information submitted in support thereof and has instructed this office to advise you that it will be favorably inclined toward your project provided an ocean-mail contract for the service above stated is awarded to you and provided further that the vessels which you propose will be built from plans and specifications approved by the Secretary of the Navy.
>
> It will be in order for you to file a formal application for loan in accordance with the Standard Procedure of the Committee. Upon receipt of your formal application and of the data required in support thereof, the Committe will give its careful consideration thereto.

The formal application referred to in this communication was filed by Seatrain Lines with the Shipping Board October 7, 1931. Therein the estimated cost of the two new vessels, security for the loan, was placed at $3,133,000, and application made for a loan of approximately $2,350,000, being 75 percent of the estimated cost.

The application was investigated by the Shipping Board, which thereupon, on November 27, 1931, adopted the following resolution:

> Whereas the Seatrain Lines, Incorporated, a Delaware corporation, hereinafter called "Applicant" on October 7, 1931, applied to the United States Shipping Board for a loan from the Construction Loan Fund to be used

in aid of the construction of two (2) vessels in a shipyard in the United States and in connection with said application has offered to enter into written contracts with the Sun Shipbuilding and Dry Dock Company for the construction of said two (2) vessels in accordance with plans and specifications submitted therefor, and

Whereas, the Board has determined that the construction of said vessels is desirable and necessary for the promotion and maintenance of the American Merchant Marine, that the plans and specifications submitted show that said vessels will be of the best and most efficient type and will be fitted and equipped with the most modern, most efficient, and most economical machinery and commercial appliances for the purpose of the service in which the vessels are to be operated (Ocean Mail Contract Service on Route #56 from New Orleans, Louisiana, to Havana, Cuba, and other foreign trade services) which service is deemed desirable by the Board.

Resolved, that the Shipping Board authorize two (2) loans, each in amount not to exceed three-fourths of the cost of each of the vessels (exclusive of commercial appliances, spares and other equipment and Supervising Architect's fees) and not to exceed $1,152,187.00 whichever may be the lesser, plus three-fourths of the actual cost of outfitting and equipping each vessel with commercial appliances, spares and other equipment and Supervising Architect's fees and not exceeding $37,500 for each vessel, whichever may be the lesser amount from the Construction Loan Fund authorized by Section 11, Merchant Marine Act, 1920, as amended, and Sec. 302 of the Merchant Marine Act of 1928, pursuant to the authority of the provisions of the Second Deficiency Act, Fiscal Year, 1928, and/or "Independent Offices Appropriation Act, 1932" and Sec. 11, Merchant Marine Act, 1920, as amended and Sec. 302 of the Merchant Marine Act, 1928, each of said loans to be used in aid of the construction in a shipyard in the United States of each of said vessels, in accordance with the plans and specifications heretofore or to be filed by said Applicant with the Shipping Board, each Loan to bear interest at the minimum rates set forth in the amendment to Sec. 11 of the Merchant Marine Act, 1920, approved February 2, 1931, for contracts thereafter entered into, payable semiannually, and the principal of each loan to be repaid in twenty (20) annual installments as nearly equal as possible, subject to the conditions set forth in a report dated November 20, 1931, from the Committee on Construction Loans of this Board and also subject to the following conditions.

(1) That the Applicant will execute a separate Loan Agreement for each of said Loans in form satisfactory to the Board and approved by the General Counsel.

(2) That the provisions of paragraph (1) and paragraph (c) under paragraph (1) of said report from the Committee on Construction Loans be embodied in each of the Loan Agreements and failure to perform the provisions of said paragraphs in the manner and at the time stipulated shall constitute a default under the provisions of each Loan Agreement and any mortgage or mortgages given pursuant thereto, but that failure to receive sufficient mail revenue to repay the full amount of the Loans shall not release the Applicant from its obligations to repay the full amount of the Loans with interest.

(3) That the Applicant will secure each of said Loans and advances made thereon by the execution and delivery of the Notes, Deeds of Trusts, and/or mortgages on the vessels required to be executed and/or furnished under the terms of said Loan Agreements, including a blanket mortgage on both of said vessels when the last vessel has been completed.

(4) That no advance be made on either Loan unless and until the plans and specifications to be submitted by the Applicant shall be approved by the Secretary of the Navy, and also unless and until the Applicant has complied with paragraph 4 of said Committee's report.

(5) That the Builder shall furnish to the Board a satisfactory surety Bond in the amount of $307,015 for each vessel to be approved by the General Counsel.

Resolved, further, that the Board's Committee on Construction Loans and Sec. 23, Merchant Marine Act, 1920, be, and it is hereby authorized to take any steps necessary to carry into effect the purpose and intent of this resolution. The Disbursing Officer is hereby authorized on vouchers or warrants signed by Commissioner Cone, or in his absence any member of the Board's Committee on Construction Loans and Sec. 23, Merchant Marine Act, 1920, to make advances on the loans. All notes, mortgages, and other necessary documents shall be deposited with the Disbursing Officer of the Board and when thus deposited, he is charged hereby with their custody and with the collection of interest and principal as they mature. In case of default, the fact of the default, shall within ten (10) days thereafter, be reported by the Disbursing Officer to the Board.

Resolved, further, the supervision of the loans (apart from payments of interest and principal) with respect

to executory responsibilities imposed on the Seatrain Lines, Incorporated, and on the yard or yards with which contracts are placed, is hereby referred to the Committee on Construction Loans and Sec. 23, Merchant Marine Act, 1920, with power; provided, however, power is not hereby delegated to release any part of the debt incurred or interest thereon, or to modify the time for the payment of interest or principal. No cancellation or satisfaction, in whole or in part, of any mortgage, deed of trust, or other documents on said vessels securing these loans, shall be executed by any official of the Board except pursuant to a resolution of the Board containing specific reference to these loans and authorizing such cancellation or surrender; this provision, however, does not preclude the surrender of notes when and as paid.

Resolved, further, this resolution shall not be deemed a contract; nothing herein contained shall impair the full freedom of the Board to revoke or modify it at any time prior to the execution and delivery by the Board of the formal loan agreements between the Board and the Seatrain Lines, Incorporated.

25. On December 3, 1931, there was executed the following ocean-mail contract between plaintiff and defendant, signed by the plaintiff, by its president, Graham M. Brush, November 25, 1931, and by the defendant, by its Postmaster General, Walter F. Brown, December 3, 1931, and reading as follows:

This contract, Made the 31st day of October 1931, under the provisions of the "Merchant Marine Act, 1928," by the United States of America, represented by the Postmaster General, and the Seatrain Lines, Inc., a corporation duly organized and existing under the laws of the State of Delaware, hereinafter called the contractor;

Witnesseth, That whereas under date of October 31, 1931, the Seatrain Lines, Inc., was accepted as contractor for ocean mail service on Route No. 56, in conformity with the advertisement inviting proposals for the service specified therein, issued by the Postmaster General under date of August 26, 1931, the said contractor, for the consideration hereinafter stated, undertakes, covenants and agrees with the United States of America, pursuant to the provisions of the "Merchant Marine Act, 1928," and the said advertisement of the Postmaster General, as follows:

1. (a) To carry all mails of the United States offered, whatever may be the size or weight thereof, or the in-

crease therein during the term of this contract, in a safe and secure manner, free from wet or other injury, from New Orleans (Louisiana) to Havana (Cuba), on a schedule approved by the Postmaster General, that shall include not less than fifty (50) trips per annum during the first two years and not more than one hundred (100) trips per annum during the remainder of the contract term (subject to other provisions of this contract for increase or decrease in frequency);

(b) To receive and take the mail and every part thereof from, and deliver it into, all post offices on the said route, unless other arrangements for its handling are agreed upon by the parties hereto;

(c) To transport upon each vessel employed in the performance of this contract such mail messengers as the Postmaster General may require, and to provide for them subsistence, suitable staterooms, and working quarters, all free of additional charge;

(d) To convey without additional charge all necessary post-office supplies and mail equipment, and at the request of the Post Office Department, to provide, also without additional charge, first-class transportation for officials and accredited post-office inspectors engaged in the service of the said Department;

(e) To carry as cadets or apprentices on all vessels operated under this contract American-born boys under twenty-five (25) years of age at the time of original employment, one (1) boy per vessel on vessels of Classes 5 and 6, and two (2) boys per vessel on vessels of higher Classes; to educate said boys in the duties of seamanship and pay each of them for his services such compensation as may be reasonable, which compensation shall in no case be less than thirty ($30.00) dollars per month;

(f) To carry on return trips parcel-post mail of United States origin being returned from foreign countries as undeliverable, and any United States military or naval mails, and any United States mail bags, all without additional charge;

(g) To provide and operate in the performance of this contract, cargo vessels of Class 5, capable of carrying not less than ninety (90) railroad cars and of maintaining a speed of thirteen (13) knots at sea in ordinary weather, and of a gross registered tonnage of not less than six thousand five hundred (6,500) tons;

(h) To have constructed in American shipyards two (2) new cargo vessels of Class 5, capable of carrying not less than ninety (90) railroad cars and of maintaining a speed of fourteen (14) knots at sea in ordinary

weather, and of a gross registered tonnage of not less than six thousand five hundred (6,500) tons, and place them in service in lieu of or in addition to vessels specified in paragraph (g) hereof, as soon as practicable, but not later than the end of the second year of the term of this contract.

2. In consideration of the faithful performance of the services and undertakings herein specified and upon receipt of satisfactory evidence thereof by the Postmaster General, the United States agrees to pay to the said contractor monthly, and as soon after the close of each month as accounts can be adjusted and settled, compensation based upon the mileage on the out-bound voyages by the shortest practicable route between the ports specifically stated herein, for vessels of the Classes authorized, or that may be authorized, at the following rates: for vessels of Class 6, two and fifty one-hundredths ($2.50) dollars per nautical mile; for vessels of Class 5, four ($4.00) dollars per nautical mile; for vessels of Class 4, six ($6.00) dollars per nautical mile, and for vessels of Class 3, eight ($8.00) dollars per nautical mile.

3. It is hereby understood and agreed

(a) That for the purposes of this contract foreign closed transit mails shall be deemed and taken to be mails of the United States;

(b) That upon the agreement of the Postmaster General and the contractor, the rates of pay stipulated hereinbefore may be changed to accord with any law or laws that may hereafter be enacted by Congress;

(c) That upon the agreement of the Postmaster General and the contractor, the Post Office Department may extend the service hereinbefore specified for Route No. 56 to additional ports; curtail the route to omit any port; omit or embrace any intermediate port; and increase or reduce the number of trips of the schedule in effect;

(d) That where the service is curtailed as provided in the preceding paragraph, the compensation of the contractor shall be decreased at the contract rate for the out-bound mileage, and where the service is extended the compensation shall be increased at not exceeding the said rate;

(e) That if a vessel of the contractor employed on Route No. 56 call at a port not specified either in Section 1, paragraph (a), or as provided in Section 3, paragraph (c) above, the mail service specified herein

for Route No. 56 shall automatically extend to the said port without compensation to the contractor over and above that for the specified route.

4. It is further understood and agreed

(a) That for the purposes of this contract vessels employed in the performance thereof shall be classified on the basis of speed without regard to tonnage;

(b) That within one (1) year from the date of the award of this contract and at such times thereafter as the Postmaster General may require, the contractor shall furnish to the Postmaster General evidence satisfactory to him of its intention and ability to place in service within the time specified the vessels which the contractor is required under this contract to employ, and in the event such evidence is not furnished him the Postmaster General may annul this contract;

(c) That the vessels to be constructed under the provisions of Section 1, paragraph (h) of this contract are to be constructed as provided by Section 405 (b), "Merchant Marine Act, 1928."

(d) That with the consent of the Postmaster General the contractor may construct and/or operate in the performance of this contract vessels of higher or lower class, and for a greater or smaller number of voyages than those specified herein, in such way and for such purposes as may be agreed upon by the parties;

(e) That upon the agreement of the Postmaster General and the contractor any vessel constructed under the terms of this contract may be operated on any American foreign trade or ocean mail route; and the mail pay for such operation shall be that authorized for the service on the route over which the vessel is operated;

(f) That in the event the United States Shipping Board before the time for the beginning of performance under this contract refuse to authorize a construction loan for the building of the new vessels which under Section 1, paragraph (h), the contractor is required to construct and operate, upon written notice of the fact and the request of the contractor before said time, the Postmaster General shall take the necessary steps to relieve the contractor of all obligation under this contract, and the same shall be deemed null and void;

(g) That in the event vessels which the contractor is required to employ in the performance of this contract be taken by authority of the United States for national defense or during any national emergency as provided in the "Merchant Marine Act, 1928," or such vessels become unavailable for operation under the terms of this con-

tract because of force majeure, the Postmaster General and the contractor may agree upon the suspension of the service herein stipulated or the termination of this contract, without penalty for failure of performance or liability upon either party.

5. It is further understood and agreed

(a) That the contractor shall be answerable in damages to the United States for any loss or damage resulting to the mails or any part thereof by reason of any failure on its part, or of its officers, agents, or employees, to exercise due care in the custody, handling, or transportation thereof;

(b) That for repeated failures in the service for which provision is made herein; or for subletting the said service or any part thereof without permission of the Postmaster General; or assigning or transferring this contract; or for combining to prevent others from bidding for the performance of any postal service, or failure to provide and operate any vessel in accordance with the provisions of the advertisement and this contract; or any violation by the contractor, its officers, agents, or employees of the provisions of the "Merchant Marine Act, 1928," or of the Postal Laws and Regulations applicable to the service specified herein; or for failure by the contractor to perform the service specified herein; or any other default on its part in the performance of this contract, the Postmaster General, in his discretion, may impose a fine or fines or other penalties upon the contractor, or annul this contract, and the annulment thereof shall not impair the right of the United States to claim damages from the contractor for the said failures or defaults;

(c) That this contract is subject to all of the provisions of the "Merchant Marine Act, 1928," and of the advertisement of the Postmaster General hereinbefore mentioned, and to the provisions of the Postal Laws and Regulations applicable to the ocean mail service; and the same are hereby made a part of this contract;

(d) That no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to apply to any case wherein the contract is for the general benefit of the contracting corporation;

(e) That the contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage,

or contingent fee. Breach of this warranty shall give the Government the right to terminate this contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6. It is further understood and agreed

(a) That the term of this contract shall be ten (10) years beginning at a date optional with the contractor but not earlier than January 1, 1932, or later than October 31, 1932;

(b) That this contract, upon agreement of the Postmaster General and the contractor, may be terminated five (5) years from the date of the beginning thereof or at any time thereafter.

In witness whereof, the parties hereto have executed this contract as of the day and year opposite their names appearing.

26. On December 3, 1931, Seatrain Lines and the Shipping Board entered into an agreement for a loan on each of the vessels to the owner, not exceeding three-fourths of the cost of the construction and equipment and not exceeding $1,152,187 on each vessel.

Sections 38, 39, and 50 of the loan agreement provided:

SEC. 38. The vessel will be operated in maintaining service on lines between New Orleans, Louisiana, and Havana, Cuba, and in other exclusive foreign service between Atlantic and/or Gulf ports and Cuba, or in such other service or services as the Board may by resolution hereafter authorize, and not otherwise.

SEC. 39. The Owner hereby agrees with the Board that, so long as there remains due the United States any principal or interest on account of this loan the vessel shall be operated in accordance with the provisions of Sec. 38 above, except that the Board may, upon application of the Owner, from time to time, by resolution, approve operation upon any other route deemed a desirable service * * *.

SEC. 50. Whereas the Owner has heretofore entered into a contract with the Postmaster General of the United States for the carriage of ocean mail for the period of ten years on the service described in Sec. 38

hereof, and is to receive therefor the compensation set forth in said contract:

Now, therefore, in consideration of the Board making this loan to the Owner and in order to induce the making of the loan, the Owner agrees to deposit with a bank approved by the United States Shipping Board to the account of "Seatrain Lines, Inc., Special Deposit," under an agreement to be approved by the United States Shipping Board, all mail revenue to be paid by the Postmaster General to the Owner on account of the carriage of ocean mail with said vessel and any other vessel pursuant to said contract, and that the sums deposited as aforesaid are to be disbursed only for the purpose of repayment of the loan hereunder and accrued interest, or in the constructive development of the Owner's business as the United States Shipping Board by special Board resolution may authorize. The Owner further agrees that in the event it fails to deposit any of the sums as aforesaid it shall be in default under the provisions hereof and of any mortgage given pursuant hereto. It is understood and agreed, however, that the failure to receive sufficient mail revenue to repay the full amount of the loan made hereunder shall not release the Owner from its obligation to repay the full amount of the loan with interest.

On December 3, 1931, also, the construction contracts between Seatrain Lines and the builder, Sun Shipbuilding & Dry Dock Co., were executed. At the same time there was executed with respect to each hull an agreement between Sun Shipbuilding & Dry Dock Co., Seatrain Lines, and the United States, represented by the Shipping Board, covering their several interests with respect to the loan.

Copy of these several agreements as applicable to each hull is attached to a stipulation herein and is made part of these findings by reference.

27. The two hulls were constructed by the Sun Shipbuilding & Dry Dock Co. in accordance with the plans and specifications filed with the Shipping Board and the Navy Department, and under the supervision of representatives of the Shipping Board and Navy Department, and were completed and delivered to Seatrain Lines—Hull No. 146 (subsequently named S. S. *Seatrain New York*), September 29, 1932, and Hull No. 147 (subsequently named S. S. *Seatrain Havana*),

October 5, 1932. The completed vessels were capable of maintaining a speed in excess of 14 knots at sea in ordinary weather.

Upon delivery of the vessels the Sun Shipbuilding & Dry Dock Co. executed proper bills of sale, conveying them to Seatrain Lines, which thereby became invested with full and complete title in the whole of both vessels.

Shortly after their completion they were duly documented under the laws of the United States, the S. S. *Seatrain New York* on September 29, 1932, and the S. S. *Seatrain Havana* on October 5, 1932.

28. In response to a request of the director of International Postal Service of the Post Office Department, the chairman of the Shipping Board certified thereto October 29, 1932, as follows:

> In accordance with the request contained in your letter, dated October 24, 1932, No. 43155–Ws–P, certification is hereby made that the S. S. *Seatrain New York* and S. S. *Seatrain Havana* of Seatrain Lines, Incorporated, were constructed in accordance with plans and specifications approved by the Secretary of the Navy in compliance with Paragraph B of Section 405 of the Merchant Marine Act, 1928.

This certificate was forwarded to the General Accounting Office by the director of the International Postal Service November 2, 1932, and on that date the following was issued:

Order

Route No. F. O. M. 56.

Classification under the Merchant Marine Act, 1928, is hereby made of the steamers *Seatrain New York* and *Seatrain Havana* of the Seatrain Lines, Inc., as vessels of Class 5.

This classification is based on speed without regard to tonnage.

[Signed] CHASE C. COVE,
Acting Second Assistant Postmaster General.

29. The two vessels as completed cost $3,174,251.96—the S. S. *Seatrain New York* $1,587,123.51 and the S. S. *Seatrain Havana* $1,587,128.45.

During the course of construction the Shipping Board advanced the sum of $2,378,794, being $1,189,397 on account

of the construction of each vessel. At the time of execution of the mortgages referred to below all accrued interest on such advances was paid in full to the Shipping Board in the sum of $10,227.

On September 29, 1932, Seatrain Lines executed and delivered to the Shipping Board, acting for the United States, a preferred mortgage on the S. S. *Seatrain New York* as security for the sum of $1,189,687 to cover advances by the Shipping Board for the account of Seatrain Lines as set out above. On October 5, 1932, Seatrain Lines executed and delivered in the same manner a preferred mortgage on the S. S. *Seatrain Havana* as security for the sum of $1,189,-687, covering advances by the Shipping Board for the account of Seatrain Lines. In accordance with the provisions of the construction loan contracts the preferred mortgage of October 5, 1932, also covered the S. S. *Seatrain New York* and constituted a blanket preferred mortgage on both vessels, thus giving a single mortgage security for the entire amount of $2,379,374. Copies of these mortgages are filed as Annexes 36 and 37 to the stipulation and made part hereof by reference.

On September 29, 1932, Seatrain Lines executed and delivered to the Shipping Board, payable to the United States or order, 20 promisory notes, numbered 1 to 20, in the sum of $59,484.35 each, the notes being payable—No. 1 one year after date, and serially one note each year thereafter, the twentieth note being due on the 29th day of September 1952. On October 5, 1932, Seatrain Lines executed and delivered to the Shipping Board like promissory notes except that they were payable on or before the 5th day of October instead of the 29th day of September. On the twentieth note of each series the Shipping Board endorsed a credit of $290. Copies of the promissory notes are filed as Annexes 38 and 39 to the stipulation and made part hereof by reference.

On December 20, 1935 Seatrain Lines paid to the United States, through the Director, United States Shipping Board Bureau of the Department of Commerce, $661,792.56, being the amount of principal of the first three of each series of notes, $356,906.10, together with the accumulated interest

accruing at the several semiannual periods, $300,830.93, and interest overdue and accruing by reason of nonpayment on the due dates, $4,055.53.

30. Before the new vessels were completed plaintiff's president became desirous of establishing a route therefor between Havana and New York as well as between Havana and New Orleans, and a through route between New Orleans and New York via Havana, thus employing the vessels in coastwise as well as foreign trade. With his counsel he appeared at a regular meeting of the Shipping Board August 31, 1932, and urged that under sections 38 and 39 of the construction loan contract Seatrain Lines was entitled to carry cargo between New York and New Orleans via Havana, and that in any event, if transshipment were made at Havana, such carriage would not conflict with the terms of the contract. The Shipping Board did not then decide the matter, but referred it to its general counsel for an opinion.

On September 23, 1932, Seatrain Lines formally petitioned the Shipping Board to transport in the vessels being constructed cargo other than that of Cuban origin or final destination.

Hearings were held by the Shipping Board on the petition, at which were present several protestants.

Following conferences and negotiations the Shipping Board, by a resolution December 21, 1932, amending a previous resolution October 6, 1932, authorized Seatrain Lines to carry cargo on coastwise trade between the ports of New York and New Orleans via Havana in the new Seatrain vessels for a period of six months from October 6, 1932.

Thereupon plaintiff made an offer to the Postmaster General to accept a reduction in mail pay between New Orleans and Havana, in view of the permission to engage in coastwise trade. To this offer the Postmaster General replied January 11, 1933, as follows:

> Receipt is acknowledged of your letter of January 9, 1933, in which you state that, in consideration of the permission granted you by the Shipping Board in its Resolutions of October 6 and December 21, 1932, to engage temporarily in coastwise trade between New Orleans and New York by way of Havana, you desire to request

a modification of your contract on Ocean Mail Route No. 56, between New Orleans and Havana, so that you shall be paid thereunder, during the period of said coastwise operation between the above-named points, only such proportion of the pay named in the contract as the revenue earned on outward voyages over the mail route from foreign traffic bears to the total revenue earned on such voyages, the revenue from other trade from New Orleans to Havana being taken as such proportion of the revenue on coastwise trade from New Orleans to New York as the distance from New Orleans to Havana bears to the total distance from New Orleans via Havana to New York.

In view of the premises and considerations stated in your letter, it would, in my opinion, be in the interest of the Government to accept your proposal, and I hereby agree to the modification of the contract on Ocean Mail Route No. 56 accordingly.

At the expiration of the six months' permissive period and thereafter Seatrain Lines had and has had permission from the Shipping Board and its successors to carry cargo on the S. S. *Seatrain Havana* and *Seatrain New York* between New Orleans and New York via Havana, while operating to and from Cuba.

31. On September 13, 1932, the plaintiff submitted to the Post Office Department its sailing schedule for the contract in suit, Route F. O. M. 56, for the month of October, for the approval of the Department. On September 17, 1932, the Post Office Department advised plaintiff:

With reference to your letter of September 13th, the schedule of proposed contract service on route No. F. O. M. 56 during the month of October submitted therewith is satisfactory to this Department.

In connection with the note shown thereon relative to regular weekly service, it is requested that the schedule for months subsequent to October be submitted for approval. This schedule may be submitted covering a six month or one year period if you desire.

In connection with the dispatch of mails on these steamers, your company will be required to call for the mails at the New Orleans post office and convey them to the steamer.

32. The S. S. *Seatrain New York* and S. S. *Seatrain Havana* sailed from New York October 6 and 13, 1932, re-

spectively, laden with cargo for Havana and New Orleans. On the return voyages they sailed from New Orleans October 13 and 20, 1932, respectively, laden with cargo for Havana and New York and carrying mail for Havana.

Thereafter they made regular sailings between the ports of New York and New Orleans via Havana, each vessel making the round trip in approximately two weeks, the Seatrain Lines thus maintaining a schedule of weekly sailings in each direction.

Schedules were filed by Seatrain Lines with the Post Office Department covering sailings for the months of October, November, and December, 1932, and they were approved by that Department. The vessels carried mail on each voyage from New Orleans to Havana up to and including December 1, 1932.

The Second Assistant Postmaster General caused instructions November 30, 1932, to be issued to the Postmaster at New Orleans to make no further dispatches of mail by Seatrain Lines on Route 56 between New Orleans and Havana, until otherwise instructed.

33. On December 5, 1932, the plaintiff transmitted to the Post Office Department its schedule of sailings for January 1933. In response thereto the plaintiff in due course received the following letter dated December 6, 1932, signed as "For the Second Assistant Postmaster General, E. R. White, Director."

> Receipt is acknowledged of your letter of December 5, submitting for approval the schedule of your vessels on Route F. O. M. 56, New Orleans to Havana, for the month of January 1933.
>
> The Department offers no objection to the proposed schedule, but it is not intended to utilize the line for the present.

The plaintiff telegraphed the Postmaster General December 8, 1932, as follows:

> We have received second assistant postmaster general's letter of December sixth stating post office department does not intend utilize our line for the present stop we respectfully advise you one of our vessels sailing today from New Orleans to Havana and sailings will be made

hereafter all as shown on schedules filed with and approved by your department and we are now and will continue to be ready, able, and willing to carry mails on our vessels on route fifty six in accordance with our contract with your department.

No mail was delivered to or carried by either the S. S. *Seatrain New York* or the S. S. *Seatrain Havana* on their sailings from New Orleans to Havana on December 8, 15, 22, 29, 1932, and January 5, 1933.

34. Beginning with the sailing of the S. S. *Seatrain Havana* on January 12, 1933, the shipment of mail from New Orleans to Havana by the S. S. *Seatrains New York* and *Havana* was resumed and continued regularly up to and including the sailing of the S. S. *Seatrain Havana* from New Orleans on October 4, 1933, except that upon request of Seatrain Lines, approved by the Post Office Department, the calls at Havana were omitted on the sailings of August 9 and 17 from New Orleans. The sailings of the two vessels were in accordance with schedules submitted by Seatrain Lines to and approved by the Post Office Department.

35. On October 14, 1933, Second Assistant Postmaster General W. W. Howes ordered discontinuance of the dispatch of all mails by Seatrain Line vessels, and on that date wrote Seatrain Lines:

> In view of the fact that the Act approved March 3, 1933, making appropriations for the Post Office Department for the current fiscal year, contains a proviso that no part of the money therein appropriated shall be paid on (ocean mail) contract No. 56 to the Seatrain Company, it has been decided, upon full consideration of the matter, that the Department is not warranted in making further dispatches of the mails by the vessels of your company on said route, and the postmaster at New Orleans has been instructed to that effect.
>
> This action is not intended to prejudice your claims under the contract anywise, but is merely a proper recognition of the action taken by Congress in prohibiting payment from the current appropriation.

To this Seatrain Lines replied October 17, 1933:

> We have your letter of October 14th, advising us that the Department has decided to discontinue the dispatch

> of mails by our vessels on our mail route and that the Postmaster at New Orleans has been instructed accordingly.
>
> In reply we wish to respectfully advise you that one of our vessels will sail on October 18th from New Orleans to Havana, and sailings will be made thereafter all as shown on schedules filed with and approved by your Department and that we are now and will continue to be ready, able, and willing to carry mails on our vessels on Route No. 56 in accordance with our contract with your Department.

Since October 4, 1933, no mail has been delivered to or carried by the vessels of Seatrain Lines, plaintiff herein.

36. Both the S. S. *Seatrain New York* and *Seatrain Havana* have since October 4, 1932, continued to make and still are making regular sailings to and from the ports in the manner heretofore described. Schedules covering such sailings were filed with the Post Office Department for each month up to and including March 1934, when the petition herein was filed.

Plaintiff has been at all times ready, willing, and able to perform its part of the contract.

Since the defendant ceased shipping mail on the vessels of plaintiff under the mail contract there has not been anything available that could have been carried in the vessels in place of the mail by which the loss of earnings suffered through the defendant not paying the agreed compensation for carrying of the mail could have been made up by plaintiff.

Plaintiff, because of its operation of the S. S. *Seatrain Havana* and S. S. *Seatrain New York* in both coastwise trade between New Orleans and New York and in foreign trade between New Orleans and Havana and New York and Havana, during each interest period under its construction loan agreements has been required to pay, and still pays, to the defendant, through the United States Shipping Board and United States Maritime Commission, in accordance with "Rules governing payment of interest on construction loans", adopted by the United States Shipping Board, interest on its construction loans on said vessels, at the rate of 5¼% per annum for the time the vessels are

considered as engaged in coastwise trade during the interest period, and at the rate of 3½% for the time the vessels are considered engaged in foreign trade during the interest period, the periods of such respective engagements in coastwise trade and in foreign trade being taken as such part of the total interest period as the ratio of the gross revenue earned in coastwise trade and in foreign trade, respectively, to the total gross revenue earned by the vessels, during the interest period.

37. On November 1, 1933, plaintiff applied to the Postmaster General for reduction in its bond from $30,000 to $100 until such time as the Government should commence to make payment under the contract. The second assistant Postmaster General replied November 7, 1933, that it was not desired to make any change in the contract or bond at that time.

38. Bills or vouchers were submitted in due course by Seatrain Lines to the Post Office Department covering each and every month October 1932, to and including June 1933, both inclusive, as follows:

Month	
1932	*Amount*
October	$6,368.14
November	8,726.19
December	10,122.58
1933	
January	6,851.72
February	7,076.70
March	8,990.74
April	6,947.14
May	8,331.76
June	6,273.86
Total	69,688.83

They were calculated in accordance with the Postmaster General's letter of January 11, 1933 (Finding 30), using 602 miles from New Orleans to Havana and Havana to New York 1,186 miles for the purpose of calculation.

The Post Office Department, by the second assistant Postmaster General, certified to the General Accounting Office all of the above-mentioned vouchers, in form as follows:

> I certify that the foregoing statement of accounts (claims) as listed on sheets numbered 1 to—, inclusive, has been examined and approved, and payment of the several amounts is authorized.

There is no satisfactory proof that the Post Office Department did not exercise a fair and reasonable judgment in arriving at the calculations or the basis thereof under the Postmaster General's letter of January 11, 1933 (Finding 30).

In the foregoing vouchers the amounts stated against the United States for the voyages on which no mail was carried were as follows:

Month	*Amount*
1932	
December 8	$1,349.68
December 15	1,349.68
December 22	1,349.68
December 29	1,349.68
1933	
January 5	1,712.93
Total	7,111.65

39. On July 12, 1933, the Comptroller General of the United States communicated with plaintiff by letter as follows:

> Referring to your letter of June 16, 1933, and previous communications relative to your claims for the transportation of the mails during the period from October 1932 to May 1933, inclusive, on F O M Route No. 56, under contract of October 31, 1931, I have to advise that in view of the doubt that has arisen as to the legality of the contract involved, the provision in the act of March 3, 1933, Public, No. 428, prohibiting the use of the appropriations for the fiscal year 1934 to make payments under the contract, and the fact that the matter is now under investigation by a special Senate Committee, it is the position of this office that no payments shall be made under this contract pending such developments as may result from the Senate Committee's investigation.

40. In addition to the bills or vouchers mentioned in Finding 38 Seatrain Lines submitted in like manner, computed on the same basis, bills or vouchsers for the following months and in the amounts indicated:

Month 1933	Amount
July	$6, 108. 47
August	6, 928. 45
September	6, 936. 00
Total	19, 972. 92

No settlement has been made by the Government on these three vouchers.

41. Plaintiff's mail pay from and after September 1933, computed in like manner, up to the time of filing of the petition herein, would be as follows:

Month	Amount
1933	
October	$4, 790. 96
November	7, 427. 24
December	6, 604. 66
1934	
January	7, 518.98
February	8, 067. 76
Total	34, 409. 60

42. (1) June 20, 1941, the United States Maritime Commission requisitioned the possession and use of plaintiff's vessels named S. S. *Seatrain New York* and S. S. *Seatrain Havana.* The vessels were delivered to the Commission under the requisition on June 25 and July 2, 1941, respectively, and ever since have been in possession of and under control of said Commission or War or Navy Departments of the Government of the United States.

(2) The War Shipping Administrator requisitioned title to S. S. *Seatrain New York* and S. S. *Seatrain Havana* as of noon Eastern War time, Tuesday, October 6, 1942.

(3) The freight revenue earned by plaintiff from the beginning of the service on October 13, 1932, to June 30, 1941 (the date nearest the requisition of the use as of which revenue earned can be determined) for the S. S. *Seatrain New York* and the S. S. *Seatrain Havana* in its foreign trade from New Orleans to Havana (Route 56) was the sum of $3,429,964.72, and the freight revenue earned in its coastwise trade from New Orleans to New York was the sum

of $3,876,997.52. Based on 602 miles, the distance from the Post Office Building at New Orleans to Havana, being the mileage adopted by the Post Office Department (see Finding No. 38), and 1,186 miles, the distance from Havana to New York, the proportion of said coastwise revenue from New Orleans to New York to be credited as revenue on Mail Route 56, in accordance with the agreement of January 9–11, 1933, between the plaintiff and the Postmaster General, would be the sum of $1,305,385.06, making the total revenue to be deemed earned on the outward voyages on Route 56 the sum of $4,735,349.78. On this basis the percentage of foreign revenue earned on outward voyages over such Route 56, to the total revenue to be deemed earned on such voyages, from October 13, 1932, to the approximate dates of requisition, would be 72.43327%.

(4) Adjusted in accordance with the agreement of January 9–11, 1933, with the Postmaster General, based on the revenues and distances set forth in paragraph (3) hereof, and on fifty voyages per annum, except the two omitted voyages, by the S. S. *Seatrain New York* and S. S. *Seatrain Havana* from the beginning of service October 13, 1932, down to June 30, 1941 (the date nearest the requisition of the use as of which revenue earned can be determined) the total compensation, after allowing a deduction of $24,456.51 for expenses saved to the time of requisition (see Finding No. 43, *infra*), would have been the sum of $730,779.12, no part of which has been paid the plaintiff.

(5) The total freight revenue earned by plaintiff from the beginning of service on October 13, 1932, to June 30, 1941, the date nearest the requisition of use, as of which revenue can be determined, with the S. S. *Seatrain New York* and the S. S. *Seatrain Havana* in foreign service between New York and Havana and Havana and New Orleans (in both directions) was the sum of $11,573,930.66, and the total freight revenue earned in coastwise trade between New Orleans and New York (both directions) was the sum of $7,670,412.20.

43. By reason of not having carried the mails, as hereinabove set forth, plaintiff has been saved certain expenses in subsistence of cadets and mail messengers, and wages of

cadets, amounting to $24,456.51 to the time of requisition of use and possession.

44. Under the provisions of the ocean-mail contract and the schedules thereunder approved by the Postmaster General, it was the intent and meaning of the parties that the defendant herein was under obligation to supply mail for at least fifty trips per annum for the contract term from New Orleans to Havana, except for the sailings omitted August 9 and 17, 1933, as shown in Finding 34 herein.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff brings this suit for the purpose of recovering on a contract with the Post Office Department for the carriage of ocean mail.

Plaintiff is the successor of three other corporations, the assets of which were taken over by it. All these corporations were organized for the purpose of developing the seagoing vessels which would carry railroad cars on ocean routes, thereby avoiding the necessity of loading and unloading at the several ports of call.

In 1929, the President of the United States created a Committee composed of the Secretary of Commerce, the Postmaster General, the Chairman of the Shipping Board and the Secretary of the Navy to solve the problems arising out of the "Merchant Marine Act, 1928", 45 Stat. 692, 698, in relation to contracts which might be let over a period of ten years for the carriage of ocean mails. This committee was authorized to appoint a subcommittee of experts from various departments to assemble material for the committee.

The committee met and designated itself as the "Interdepartmental Ocean Mail Contract Committee" and appointed a subcommittee which designated itself as the "Interdepartmental Subcommittee of the President's Committee on Ocean Mail Contracts."

On September 12, 1929, Graham M. Brush, who was president and an active mover in the Over-Seas Railways Corporation, one of the predecessors of plaintiff, consulted with the officials of the Navy Department and, after such con-

sultation, formally applied to the chairman of the Subcommittee for an ocean mail contract. In this application it was proposed to use a vessel, which was built in English shipyards, after having it transferred to American registry, and to have additional vessels of the same type and size constructed in American shipyards. On the same day Brush submitted blueprints of the general arrangement of this type of vessel to the Secretary of the Navy with an inquiry as to its value as a naval auxiliary in time of national emergency.

On October 17, 1929, the acting Secretary of the Navy replied to this inquiry stating that "the peculiar construction of the vessel would be of particular value to the Navy, as regards ease of conversion, for use as an aircraft carrier," and that the "design is also well adapted to conversion to several types of auxiliary vessels which the Navy would require." Merchant Marine Act, Sec. 405, 406, *supra.*

Brush also submitted his plans to the Subcommittee in February 1930 and the information presented by him was carried in the New York Times, the Journal of Commerce, and the United States Daily the following day. The Subcommittee appointed an examiner who went into the details of the Over-Seas' proposal for an ocean mail contract from New Orleans to Havana and made a favorable report concluding "that the proposals of the Over-Seas Railways, Inc., are sound and their service has the best outlook toward permanency." The Subcommittee recommended to the Interdepartmental Committee, which was composed of three Cabinet members and the Chairman of the Shipping Board, that the contract be advertised.

Negotiations were carried on and various meetings held, and on January 31, 1931, Brush proposed two new vessels and altered his plans and designs of these vessels to conform to the specifications of the Navy Department. Further examinations were made by the Subcommittee and a favorable report was made to the Interdepartmental Committee, including in the report as follows:

> It was moved and carried to recommend favorable consideration of the Over-Seas Railways, Inc., proposal, as amended under date of January 31, for the certification of a mail contract route from New Orleans

to Havana. The proposal contemplates the building of two new vessels capable of carrying loaded railway equipment. The first to be built within two and the second within four years from the award of a mail contract. The number of sailings proposed is fifty sailings per year for the first two years and one hundred sailings per year thereafter.

In reference to the use of the ship which was built in England, the committee reported as follows:

> The question of eligibility of the steamer *Seatrain* was referred to the Post Office Department solicitor, who confirmed the position of the applicant that the *Seatrain* could be made eligible for mail contract service by transferring it to American registry.

Nothing was done in this matter, owing to the national economy situation, until June 1931 when Brush wrote to the Postmaster General making application for an ocean mail contract and agreeing to construct two new vessels immediately upon the granting of the mail contract and to put them in operation not later than eighteen months thereafter. The Interdepartmental Committee in July 1931 approved this application and recommended the advertising of an ocean mail contract as suggested by the Over-Seas Railways corporation.

On July 29, 1931, the Postmaster General notified the Chairman of the Shipping Board that he had, under section 402, as amended, of the Merchant Marine Act of 1928, *supra*, certified to the United States Shipping Board, an ocean mail route from New Orleans to Havana, and in this notice was set out at least fifty trips a year with an increase to not more than one hundred trips after the second year. In August 1931 the Shipping Board certified to the Postmaster General a mail route from New Orleans to Havana setting out the type of vessel to be used at the commencement of the service and the replacement by vessels of a certain type. Both types mentioned by the Shipping Board required vessels carrying not less than ninety railroad cars. Merchant Marine Act, *supra*, Sec. 403. The press published generally the fact of this certification throughout the country.

On August 11, 1931, application was made to the Shipping Board for construction of the two new vessels to be built

and operated on the ocean mail route from New Orleans, Louisiana, to Havana, Cuba. This application was made in the name of the Seatrain Lines which was the successor of the Over-Seas Railways, Inc. and the other corporations involved.

Before acting on the application, the Shipping Board notified other interests of the application. Especially were notified the Florida East Coast Railway Company and the Munson Steamship Line which requested opportunities to be heard. Advertisements of a hearing on the application of the Seatrain Lines and the proposed establishment of this ocean mail route were inserted in papers from Boston to Houston, Texas, including all those papers in the states mentioned in the Merchant Marine Act for the East coast. These advertisements were carried in these papers once a week for three weeks. The advertisement was in detail calling for bids on the route and setting out the requirements of the vessels to be used. (Merchant Marine Act, *supra*, Sec. 406 [Finding 19].)

The Shipping Board invited the New York & Cuba Mail Steamship Company, the Florida East Coast Railway Company, the American Sugar Transit Corporation, the United Fruit Company, and the Munson Steamship Line to attend a designated hearing before the Board on the application of the Seatrain Lines for a loan from the Construction Loan Fund. The meeting was held in September 1931 and representatives of these companies and others appeared and were given full opportunities to be heard.

In October 1931 the Seatrain Lines submitted its bid in accordance with the advertisement. None of the others made a bid.

On October 31, 1931, the offer of the Seatrain Lines was duly accepted and the Assistant Postmaster General duly notified the Seatrain Lines of its acceptance.

The Chairman of the Shipping Board Committee on Construction Loans submitted to the Chief of Naval Operations, Navy Department, the question of the usefulness of the proposed vessels to the United States in time of national emergency. After conferences between the Shipping Board and the Navy Department and the plaintiff, an agreement was

reached whereby the Chief of Naval Operations and the Secretary of the Navy agreed upon the design of the vessels which would bring them into the class required by the Navy, in case of national emergency, as naval auxiliaries.

After this approval by the Navy Department the Seatrain Lines entered into negotiations with several shipbuilding companies to construct vessels according to the plans and specifications agreed upon. As a result of these negotiations, invitations for bids were asked and an award was made to the Sun Shipbuilding & Dry Dock Company for the construction of two new vessels to be delivered before October 30, 1932. There followed afterwards negotiations with the Shipping Board for a loan on these two vessels which resulted in the Shipping Board advancing the sum of $2,378,-794.00 on the two vessels. The construction cost of these ships amount to $3,174,251.96.

On December 3, 1931, the ocean mail contract between plaintiff and the United States was duly signed by the Postmaster General for the ocean mail route from New Orleans to Havana, known as Route No. 56, for a period of ten years. [Finding 25.]

The two ships were constructed by the Sun Shipbuilding & Dry Dock Company in accordance with the plans and specifications filed with the Shipping Board and the Navy Department, and under the supervision of representatives of the Shipping Board and the Navy Department, and were completed and delivered to the Seatrain Lines on September 29, 1932, and October 5, 1932, respectively. These ships were duly documented under the laws of the United States and were known as S. S. *Seatrain New York* and S. S. *Seatrain Havana.*

This brief summary of the facts has been made of the steps taken but the court has also made elaborate findings in detail which show minutely every application, decision, and requirement which was taken. From the first application to the last decision, over seventeen months elapsed, and there were decisions made by three Cabinet members, by the Shipping Board, the Navy Department, and the Postmaster General in strict compliance with the statute. All adverse competitive interests and all prospective interests were given

full opportunity to be heard, and were heard and given an opportunity to bid. The ocean mail contract provisions of the Merchant Marine Act, *supra*, sections 401 to 411 inclusive and 413, were strictly and minutely complied with. Under the terms of these sections the Postmaster General, under certain terms and conditions, was given the right to enter into a contract for the carriage of ocean mail. In this instance, every requirement, every condition, and every provision were strictly and painstakingly performed and carried out, and the contract entered into by the Postmaster General with the plaintiff became a valid, binding agreement between the United States and the plaintiff.

In September 1932 depression in business generally had affected also the business in Cuba with the result that there were few shipments to Cuba and still less from Cuba to the United States. Before the delivery of the first of the two vessels, the Seatrain Lines petitioned the Shipping Board in September 1932, requesting that the route between New Orleans and Havana be extended so as to include a route from New York to Havana to New Orleans and from New Orleans to Havana to New York, and in this way employing the vessels in coastwise as well as foreign trade.

Hearings were held and as a result the Shipping Board by resolution agreed and authorized the Seatrain Lines to carry cargo on coastwise trade from New York to New Orleans via Havana for a period of six months commencing from October 6, 1932. Thereupon the plaintiff made an offer to the Postmaster General to accept a reduction in the mail pay between New Orleans and Havana in view of the permission to engage in coastwise trade. This modification of the contract the Postmaster General agreed to and the contract was changed so that the payments made thereafter, instead of being on the mileage rate, would be for "only such proportion of the pay named in the contract as the revenue earned on outward voyages over the mail route from foreign traffic bears to the total revenue earned on such voyages, the revenue from other trade from New Orleans to Havana being taken as such proportion of the revenue on coastwise trade from New Orleans to New York as the distance from New Orleans to Havana bears to the total dis-

tance from New Orleans via Havana to New York." Various extensions of this permission have been granted before expiration of the previous permission by the Shipping Board and its successor.

On September 13, 1932, plaintiff submitted to the Post Office Department its sailing schedule for the month of October for approval. The schedule submitted was approved by the Post Office Department.

Sailings were made by the S. S. *Seatrain New York* and S. S. *Seatrain Havana* from New York October 6 and 13, 1932, laden with cargo for Havana and New Orleans, and on the return they sailed from New Orleans October 13 and 20, laden with cargo for Havana and New York, and carrying mail for Havana.

Regular sailings were made by these vessels from New Orleans to Havana, Havana to New York, and from New York to Havana and then to New Orleans carrying mail and merchandise to Havana and from New York to New Orleans and from New Orleans to New York.

These schedules were carried out with few interruptions until December 1, 1933, when plaintiff was notified by the Postmaster General that no further mail would be dispatched by the Seatrain Lines vessels.

The reason assigned for this discontinuance was that Congress had attached to the Post Office Department's appropriation bill, approved March 3, 1933, a proviso that no part of the money appropriated should be paid on the contract for ocean mail Route No. 56 to the Seatrain Lines, Inc. (47 Stat. 1489, 1510). In this notice was the statement that the action taken by the department was not intended to prejudice plaintiff's claim under the contract but was simply a recognition of the action taken by Congress in prohibiting payment from the current appropriation. In reply to this notification by the Post Office Department the Seatrain Lines, Inc. notified the Department that sailings would be made under the regular schedule filed with and approved by the Department and that the Seatrain Lines would be, and would continue to be, ready, able, and willing to carry the mails on vessels on Route No. 56 in accordance with its contract.

Since December 1, 1933, no mail has been delivered to or carried by the vessels of the Seatrain Lines, Inc.

Under the rights granted to the Postmaster General under the Shipping Act of 1928, he was authorized to enter into contracts for the carriage of ocean mail on certain routes designated by him under certain terms and conditions.

The Seatrain Lines, Inc. had been put to great expense and become heavily indebted to the Shipping Board in building these two vessels, which were to be used over the route designated by the Postmaster General, according to the plans as approved by the Navy Department and the Shipping Board.

When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and these terms and conditions are fully carried out and a contract entered into, it becomes a valid, binding agreement of the Government, and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation. The defendant can no more take away from a citizen his rights under a contract entered into with the United States than can a municipality, or a state, and a contract with the United States cannot be nullified by the United States unless it falls within the Federal police power or some other paramount power. No other power is claimed.

There is a contention by the defendant in its brief that this contract was entered into by fraud and collusion. No pleading has been filed alleging fraud or collusion; no evidence taken to prove either one of these contentions, and there is no semblance of any action by any head of a department, agent of a department, committee, or individual which gives any color or reason for such a charge. Every step and every action of the department was published in the newspapers, including advertisements and notices, and full hearings were granted to adverse and prospective interests. In every instance a decision was made in favor of the Seatrain Lines, Inc. We are unable to find the smallest infraction of any law of Congress, or any rule or regulation of any department which has not been fully complied with. There were

many adverse interests of great strength and power which were opposed to the establishment of this route because of the probable interference with their own established business but, after open and fair hearings, the decisions of the Board, before whom the hearings were held, were invariably in favor of the Seatrain Lines, Inc.

We cannot accept a mere charge of fraud in a brief unsupported by pleading or evidence, as a basis sufficient to justify us in giving it factual notice in our special findings.

Plaintiff had incurred heavy expense in the building of these two vessels in strict compliance of the shipping act of 1928 and had obligated itself to the Shipping Board for millions of dollars to be paid regularly at stated intervals until the mortgages held by the Shipping Board were paid. It had pledged the revenue derived from the mail contract to be held to apply to the loan made by the Shipping Board. The plaintiff has fully complied with the terms of repayment.

In our judgment, defendant has breached the contract and by this breach plaintiff has suffered damages.

In the passage of the 1934 appropriation act for the Post Office Department Congress did not attempt to repudiate plaintiff's contract. It simply deprived the Department of the right to use any of the money to make payments on this mail contract.

Plaintiff had a right under the contract to be paid as called for by its terms and the failure to pay was a breach of the contract by the defendant.

As was said in the *Sinking-Fund Cases*, 99 U. S. 700, 719,

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

See also *Lynch* v. *United States*, 292 U. S. 571, 580.

The next question we have to meet is that of the amount of damages to which plaintiff is entitled by reason of the breach of the contract by the defendant.

The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party

has sustained. *United States* v. *Behan*, 110 U. S. 338, 344.

The class to which a vessel belonged was to be designated by the Postmaster General based on speed without regard to tonnage and the Postmaster General had to determine the number of nautical miles by the shortest route between ports involved. (Merchant Marine Act, *supra*, Sec. 408b). The payments were to be made for the number of miles on each outward voyage without regard to the actual mileage traveled.

The Postmaster General classified these vessels and determined the number of miles from New Orleans to Havana and from New York to Havana. He certified for payment the vouchers for the voyages actually made but no payment was made by the General Accounting Office on the ground that the Congress was examining into the contract. No adverse ruling was made by the Comptroller General concerning the validity of the contract. The Postmaster General contended before all committees of the Congress that the contract was valid and his good faith in the legality of the contract was the certification for payment of the vouchers. Payment has never been made for any voyage on which the mail was carried.

The contract was for ten years commencing in October 1932 which would give it life to October 1942. However, on June 20, 1941, the Maritime Commission requisitioned the possession and use of the vessels S. S. *Seatrain New York* and S. S. *Seatrain Havana* and delivery under the requisition order was made on June 25 and July 2, 1941, respectively.

The plaintiff performed part of the contract and was ready, willing, and prepared to perform the entire contract to the time when the vessels were taken over by the defendant. The plaintiff was required to perform at least 50 trips a year and was never required to perform more than that number.

Based on fifty trips a year the plaintiff would have earned from the commencement of the contract to the dates when the ships were actually taken over by the defendant the sum of $755,235.63, less expenses saved to the time of requisition in the amount of $24,456.51, leaving a balance of $730,779.12, which constitutes and is the actual damage the plaintiff has suffered by the breach of the contract by the defendant.

Plaintiff is entitled to recover the sum of $730,779.12.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and LITTLETON *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

LEBANON WOOLEN MILLS, INC., v. THE UNITED STATES

[No. 44080. Decided April 5, 1943. Plaintiff's motion for new trial overruled June 7, 1943]

On the Proofs

Government contract; agreement to perform contract within specified time is enforceable.—The Government can take from a contractor an enforceable agreement to perform his contract within a specified period or receive compensation ratably diminished according to a reasonable scale for late performance, even if no actual damages are or can be proved. *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 659; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118, cited.

Same; date of formal contract fixes time for delivery.—Time for delivery of goods under Government contract began to run from August 12, 1935, the date of the contract, where contractor had prior to August 12 received notice to proceed which stated that formal contract would be executed later but would be dated as of August 12.

Same; "unforeseeable difficulties".—Difficulties with reference to the dyeing and weaving of Army blankets were not "unforeseeable difficulties" to a contractor, manufacturer, who knew that the work was new to it, and would have to be started with the help of experts.

Same; date of delivery falling on Saturday.—Where the dates set for delivery of each installment of goods by contractor fell on Saturdays but the Form of Bid, which was a part of the contract, gave notice that the Government depot where the goods were to be delivered would not be open on Saturdays or Sundays and that no deliveries would be accepted there on those days; the contractor was not in default in his deliveries until the Mondays following the Saturdays on which deliveries would have been due but for this notice, and the number of days of default for each delivery is computed from Monday, rather than from Saturday.

The Reporter's statement of the case:

Mr. Robert H. McNeill for the plaintiff. *Messrs. Kelly Kash* and *Bruce Fuller* were on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Newell A. Clapp* and *J. H. Reddy* were on the briefs.

The court made special findings of fact as follows:

1. Bliss Fabyan & Co., Inc., as selling agents of Lebanon Woolen Mills, Inc., plaintiff herein, entered into a contract with the defendant, represented by E. J. Heller, Captain, Q. M. C., as its contracting officer, whereby, for the consideration of $211,000, the contractor agreed to furnish and deliver at the Philadelphia Quartermaster Depot, 21st and Johnston Streets, Philadelphia, Pa., 40,000 blankets, wool, olive drab, model 1934, in the quantities and at the prices specified in a schedule of supplies attached to the contract, in strict accordance with the specifications, schedules, and drawings, made a part of the contract and designated: Schedule of Supplies; U. S. Army Tentative Specification dated June 5, 1935; U. S. Army Specification No. 100–2D; Standard Government Form of Bid No. 669–36–9. The form, of which these several documents were made a part, was Standard Form 32 approved by the President June 10, 1927.

The contract, including the schedule, specifications, and form of bid, referred to, is filed in evidence and made a part of these findings by reference.

The Schedule of Supplies, part of the contract, shows a break-down of the contract price as follows:

Quantity	Unit	Unit price	Total
10,000	Each	$5.15	$51,500.00
10,000	Each	5.25	52,500.00
20,000	Each	5.35	107,000.00
			211,000.00

The contractor was notified of the award of the contract August 9, 1935, by a letter signed by L. O. Grice, Captain, Q. M. C., as contracting officer, which read as follows:

> Your bid dated August 6, 1935, received in response to Invitation to Bid No. 669–36–9, has been accepted and

award is made you for furnishing and delivering at this depot, the following:

BLANKETS, Wool, Olive Drab, Model 1934 (Stock No. 27-B) to conform in all respects to requirements of U. S. Army Tentative Specification, dated June 5, 1935:

10,000	At $5.15 each.
10,000	At $5.25 each.
20,000	At $5.35 each.

Terms: Net.

Contract will be numbered W-669-qm-ECW-333, dated August 12, 1935, and will provide for deliveries as follows:

5% within 40 days, and not less than 6% each 7 days thereafter to complete the quantity contracted for within 150 days after date of this contract.

Contract will provide for a variation of 3% under the terms and conditions of Article 7 of the contract. This amount must not be exceeded.

Please observe the requirements for packing and marking given on Sheet No. 7 of Invitation to Bid No. 669-36-9, which must be closely followed.

This depot should be informed when work will begin in order that a Government Inspector may be assigned to your factory.

Performance bond in the amount of approximately 20% of the contract amount will be required under this contract.

This is your authority to proceed with the work pending the execution of formal contract papers which will be forwarded to you for signature as soon as they can be prepared.

Please acknowledge receipt.

An executed copy of the contract was sent to the contractor on October 1, 1935. The contract, written on Form 32, stated that it was entered into August 12, 1935.

Article 1 of the contract provided:

Deliveries shall be made as follows: Five per centum (5%) within forty (40) days and not less than six per centum (6%) each seven (7) days thereafter, to complete the quantity contracted for within one hundred fifty (150) days after date of this contract.

There is nothing stated in the contract as to priority in delivery of the severally priced blankets.

Article 7 of Form 32 provided:

ARTICLE 7. *Increase or decrease.*—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 percent, will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and payments shall be adjusted accordingly.

Articles 6 and 7 of the Schedule of Supplies provided:

6. Variations: Quantities listed hereon are subject to increase (or decrease) of not to exceed 3% in lieu of the variations and under the conditions stipulated in Article 7 of this contract.

7. Schedule of deliveries: Five per centum (5%) within forty (40) days and not less than six per centum (6%) each seven (7) days thereafter, to complete the quantity contracted for within one hundred fifty (150) days after date of this contract.

LIQUIDATED DAMAGES.—Under the terms and conditions stipulated in Article 15 of this contract, the contractor shall pay to the Government, as liquidated damages, for each unit undelivered, a sum equal to one-fifth of one per centum (1/5 of 1%) of the price of each unit for each day's delay after the date or dates specified.

Standard Government Form of Bid No. 669–36–9, referred to in the first paragraph of this finding, provided that the supplies were to be delivered f. o. b. Philadelphia Quartermaster Depot, 21st and Johnston Streets, Philadelphia, Pennsylvania, where final inspection and acceptance would be made. In this form were other provisions regarding deliveries, among them the following:

DELIVERY REQUIREMENTS.—Deliveries are to commence at the earliest practicable date, with frequent substantial periodical deliveries until completion. COMPLETE AND FINAL DELIVERY MUST BE EFFECTED WITHIN ONE HUNDRED FIFTY (150) DAYS FROM RECEIPT OF NOTIFICATION OF AWARDS. All calendar days are counted.

Bidders are informed that the term "DELIVERY" is interpreted to mean the receipt, at destination depot, of acceptable articles.

The Government reserves the right to purchase elsewhere any part undelivered within the time specified in the delivery schedule of the contractor, and excess cost, if any, will be charged to the contractor.

TIME OF PERFORMANCE.—Bidders will state in the blank spaces provided therefor, the least number of

calendar days (counting Sundays and holidays) after date of receipt of notice to proceed, in which they will complete performance.

In stating the time for deliveries, bidders should make allowances for both probable and unforeseen difficulties that may be encountered and they should make no promises they are not positive, beyond question, that they can fulfill, as they will be held strictly and absolutely to the schedule of deliveries offered by them.

PROPOSED DELIVERIES.—Conforming to "DELIVERY REQUIREMENTS" above, bidders will here state the schedule of deliveries they propose to make, indicating the percentage and time required for first and subsequent deliveries; the percentages being of the TOTAL quantity bid for. All calendar days, including Sundays and holidays, are to be counted.

First delivery of ------ percent in ------ days from receipt of notification of award.

Subsequent deliveries of ------ percent each ------ days after first delivery.

VARIATIONS.—*a.* Bids will be considered for only the quantity shown by the proposed schedule of deliveries as possible of complete delivery within the time specified under "DELIVERY REQUIREMENTS."

This form also stated that the Philadelphia Depot was operating on a five-day week basis, and that no deliveries would be accepted there on Saturdays, Sundays, or holidays.

U. S. Army Tentative Specification dated June 5, 1935, referred to in the first paragraph of this finding, provided that the workmanship should be first class in every respect.

With regard to delays and damages to the United States therefor, Article 15 of the contract provided:

ARTICLE 15.—*Delays.—Liquidated damages.*—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified in Article 1, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: *Provided, however,* That the Government reserves the right to terminate the right of the contractor to proceed and to purchase similar material or supplies in the open market or secure the manu-

facture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: *Provided further*, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors: *Provided further*, That the contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Standard Government Form of Bid No. 669–36–9 contained also an article covering liquidated damages as follows, omitting the provisos, which were the same as in Form 32:

LIQUIDATED DAMAGES.—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery a sum equal to one-fifth of one per centuum (1/5 of 1%) of the price of each unit, for each day's delay after the date or dates specified for deliveries, and the contractor and his sureties shall be liable for the amount thereof; * * *.

2. Plaintiff manufactured the blankets and delivered them in installments, and by January 9, 1936, had delivered to the defendant 40,000 blankets, and shortly thereafter an additional 1,199 blankets, for all of which it was paid the agreed prices, except that from such prices there was withheld liquidated damages of $10,144.07 for delays in deliveries, deduc-

tions therefor having been made from time to time in installments from vouchers presented by the contractor for payments on deliveries made.

3. Before plaintiff could get into production certain preparatory work had to be done. The specifications required dye of a certain color, and the blankets had to have a so-called "tuck" nap, formed by a loop in the fibre instead of the ordinary free end. Both of these requirements necessitated the use by plaintiff of experts in dyeing and in weaving.

Arrival at an acceptable dye involved a special formula, since the dye was affected by local conditions such as the chemical content of local water, and the producer of the dye gave plaintiff the services of a dye expert at the mill. Plaintiff also had to send to the Quartermaster Depot at Philadelphia a sample of wool, weave, and dyed product for inspection before production. All these matters required time. Cut samples of the goods to be manufactured, known as swatches, were sent to Philadelphia for approval. In one instance the Philadelphia depot got swatch numbers interchanged, purportedly approving one swatch number whereas the approval was intended to cover another number. Plaintiff was not delayed by this confusion.

The evidence does not show that in any respect the Government delayed plaintiff's work, or that plaintiff was delayed for any reason excusable under the terms of the contract.

4. September 21, 1935, plaintiff wrote the Philadelphia depot as follows:

> We are sorry but we are going to be late on the first few deliveries, but we hope to make up the difference on subsequent deliveries and are sure we will complete the entire order within the 150 days.
>
> We wrote yesterday in reference to an error in sending a wire of the 19th reading: "Retel shade swatch number three approved stop deliveries must be no browner." We certainly wish we could get straightened out on this and if you will refer to our letter of the 20th you will note we have gone ahead, assuming you have approved sample swatch No. 7 and if we are wrong then we asked that you wire us immediately. We had to use a little guess work, as we have been held up four or five days trying to get this information.

To which the depot replied September 27, 1935:

This depot regrets to learn by your letter of September 21 that your first deliveries will be late.

In this connection you are advised that the Contracting Officer is without contractual or legal authority to grant extensions of time for any of the deliveries shown in the delivery schedule of formal contracts for any reason. Any liquidated damages provided for in the contract will be charged to your account as they accrue.

The only conditions under which you can secure refund of these charges are those set forth in Article 15 of the contract. In event you wish to file claim for refund, you may do so after performance under the contract has been entirely completed, at which time you will know definitely the amount involved.

Letters claiming refunds in such cases should be addressed to the Comptroller General of the United States, General Accounting Office, Washington, D. C., and mailed to the Commanding Officer, Philadelphia Quartermaster Depot, 21st and Johnston Streets, Philadelphia, Penna., where necessary papers will be attached and forwarded to higher authority.

Plaintiff, after completing performance, prosecuted its claim for refund of liquidated damages as prescribed in the letter of September 27, 1935, and it was denied.

5. June 8, 1936, the contracting officer made the following findings of fact. They do not appear to have been communicated by him to the contractor or to the plaintiff.

FINDINGS

In investigating the claim of Bliss Fabyan & Company, Inc., New York, N. Y., for refund of liquidated damages amounting to $10,144.07, charged under Contract W-699-qm-ECW-333, I have found the following facts:

That Proposal No. 669-36-9, under which this contract was let, provided for submission to this depot, before going into production, samples of all component items to be used in the manufacture, and a finished acceptable sample of the article covered in the contract, for examination and test;

That all samples submitted by the claimant were examined and tested expeditiously and promptly, and that no undue delay occurred in this respect;

That Article 15 of the contract provided for assessment of liquidated damages in event of any delay in the contract delivery schedule;

That the amount of liquidated damages charged to the contractor was in accordance with the terms of the contract and therefore not excessive as contended by the claimant;

That the reasons for, and the causes of, delay as set forth in the contractor's letter of claim cannot be construed as being unforeseeable or without the fault or negligence and beyond the control of the contractor as covered in the conditions set forth in Article 15 of the contract;

That the contractor delivered 1199 blankets, in excess of the contract quantity under the conditions stipulated in Article 7 of the contract; and

That in my opinion the delinquencies on this contract could in no wise be attributed to Acts of the Government.

6. The contracting officer calculated liquidated damages by taking Saturdays as agreed delivery days. The depot at which delivery was required under the contract was closed on Saturdays, Sundays, and holidays and plaintiff was duly notified of such closings. No deliveries were made on Saturdays, Sundays, or holidays. If the Monday immediately following the Saturday taken by the contractor officer as the agreed delivery day be used in the calculation, the liquidated damages amount to $9,292.99, which is $851.08 less than the assessment of $10,144.07.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff was the successful bidder for a contract to manufacture and deliver 40,000 wool blankets to the Government. Plaintiff was notified of the award on August 9, 1935, and was told that the contract would be dated August 12, and would require delivery of the blankets in specified installments, and that plaintiff was authorized to proceed immediately to perform the contract, pending the preparation of the formal papers.

Plaintiff did so proceed, without waiting for the signing of the formal contract. It did not receive its copy of that document until October 1. Plaintiff, not having had experience in the use of the olive drab dye nor the "tuck" nap

required for the blankets, was delayed in getting the order into production, as it had to call upon the services of a dye expert and a weaving expert. Plaintiff was late in its delivery of the first installment of the blankets, and also of some later installments, but it delivered the entire number of blankets within the 150 days specified in the contract for complete delivery. In making payments to plaintiff for the installment deliveries, however, the Government deducted ⅕ of 1 percent of the price of each unit for each day of lateness in the delivery of that unit. This deduction was provided for in Article 7 of the Schedule of Supplies, quoted in finding 1. These deductions amounted to $10,144.07. Plaintiff's contention is that the deductions should not have been made, and that it should recover them here. Plaintiff asserts several grounds for recovery.

First. Plaintiff urges that the provision of the contract for liquidated damages is unenforceable, because no actual damages were or could have been proved, and therefore the provision was for a penalty. We have no doubt that the Government can take from a contractor an enforceable agreement to perform his contract within a specified period, or receive compensation ratably diminished according to a reasonable scale for late performance. See *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 659; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118. If this were not so, the Government would be practically helpless in regard to the time of performance of many of its contracts. If soldiers do not receive the blankets, or the guns, which are ordered for them, it would usually be impossible to prove that their discomfort or danger resulting from the delay caused a pecuniary loss to the Government. That would not mean that it was not important that the blankets or the guns be delivered on time, or that the Government should pay the full price for a late delivery, when it had agreed only to pay a lesser price for a late delivery.

Second. Plaintiff contends that time for delivery did not begin to run until the formal contract was delivered on October 1, and that, measuring from that date, all deliveries were within the specified periods and no liquidated damages were assessable. The formal contract, though executed later, was dated August 12. Plaintiff was advised in writing on

August 9 that the formal contract would be executed later, but would be dated August 12, and that the August 9 notice was plaintiff's authority to proceed with performance. The periods for performance set in the August 9 notice had reference to measurement from August 12. Plaintiff so understood them, and, so far as it could, performed accordingly. It does not claim that it was in fact delayed by the fact that the formal contract was not executed until later.

Third. Plaintiff urges that it was delayed by acts of the Government, and by unforeseeable difficulties which, according to Article 15 of the contract, excused late performance. The evidence does not support these contentions. It does not show that plaintiff was delayed at all by any act of the Government. And the difficulties with reference to the dyeing and weaving were not unforeseeable difficulties to a contractor which knew that the work was new to it, and would have to be started with the help of experts.

Plaintiff is, however, entitled to some of the money withheld from it. The contract, dated August 12, provided for the delivery of 5 percent of the blankets within 40 days, and for further installments at intervals of seven days thereafter. That happened to place each of the delivery days on Saturday. But the Form of Bid which was a part of the contract provided that the Philadelphia Depot, where deliveries were to be made, would not be open on Saturdays or Sundays and no deliveries would be accepted there on those days. Thus plaintiff was not in default on its delivery of each installment until the Monday following the date set for the delivery of the installment. If it had delivered on Monday, it would not have been in default at all, hence if it delivered on Wednesday, it was two days late, not four. In finding 6 the difference in the amount of liquidated damages resulting from counting the delay from Monday instead of Saturday is shown to be $851.08. Plaintiff is entitled to a judgment for that amount. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of the case.

THOS. SOMERVILLE COMPANY v. THE UNITED STATES

[No. 44419. Decided April 5, 1943]

On the Proofs

Government contract; basis of measurement of radiation provided for in contract controlling, although improper basis.—Where contract provides that radiation to be furnished shall be measured on the basis of Bureau of Standards measurements and not according to catalogue ratings, Bureau of Standards measurements govern, even though this might be incorrect basis of measurement, and plaintiff is not entitled to recover on basis of catalogue ratings.

Same; discount.—Where contract provides for a certain discount upon payment of invoices within a certain number of days after submission of a correct invoice, and plaintiff never submits a correct invoice, the defendant is entitled to the discount at the time of the payment of the invoice, it appearing that in some Government departments, at least, no bill is paid by such department until a correct invoice is submitted.

The Reporter's statement of the case:

Mr. C. M. Houchins for the plaintiff. *Mr. Allen G. Gartner* was on the brief.

Mr. G. V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. At all times material to this action plaintiff was a corporation, organized and existing under the laws of the District of Columbia, with its principal place of business in Washington, D. C., and was engaged in the heating and plumbing supply business.

2. On May 26, 1936, defendant accepted plaintiff's bid, submitted pursuant to invitation theretofore issued, for the furnishing of certain heating equipment for use in the Cincinnati Suburban Resettlement, Greenhills, project.

3. Pertinent excerpts from the Invitation, Bid, and Acceptance follow:

INVITATION

Sealed bids * * * will be received * * * for furnishing the following supplies * * * RADIATORS * * *

BID

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers, and agrees, * * * to furnish any or all of the items upon which prices are quoted * * *.

Discounts will be allowed for payment as follows:
15 days proximo
~~10~~ calendar days, 5 percent; 20 calendar days, ___ percent; 30 calendar days, net percent.
Bidder Thos Somerville Co. * * *

ACCEPTANCE * * *

Accepted as to items * * * Encircled * * *

CONDITIONS

* * * * *

2. Time, in connection with discount offered, will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

* * * CONTINUATION SCHEDULE * * *

(Supplies)

Item No.	Articles or services	Quantity	Unit	Unit price	Amount	
					Dollars	Cents
1	Hot water radiation, in accordance with the following specifications.	180,000	sq. ft.	$.2023	36,414	00

Material.—All radiators shall be of the best quality and grade of cast iron. * * *

All radiators shall be of wall, floor, or legless tube type of hot water pattern.

Testing.—All radiators shall be tested before shipment * * *.

Painting.—All radiators shall receive a dipped priming coat of paint. * * *

Size.—All radiation must be furnished in accordance with the United States Bureau of Standards measurements, and not catalogue ratings.

Size and style, which cannot be determined at this time, will be furnished successful bidder well in advance of requirements.

The Government reserves the right to increase or decrease this amount by 33⅓%.

Bidders shall quote unit price per foot. * * *

4. Plaintiff delivered and defendant accepted radiators of the sizes and styles specified in shipping orders issued from time to time by defendant's resident engineer. The first delivery was made on August 21, 1936, and the final delivery on April 23, 1937.

On January 19, 1937, plaintiff rendered to the Procurement Division of the Treasury Department an invoice covering deliveries made during August 1936. In this invoice plaintiff claimed payment for 31,100 square feet of radiation. On January 26, 1937, the Chief, Emergency Relief Account Section, Procurement Division, advised plaintiff by letter that instead of receiving 31,100 square feet of radiators as invoiced on January 19, only 25,675 square feet had been received. Plaintiff's attention was called to the fact that it had used catalogue ratings, which basis was contrary to the provisions of the contract, instead of Bureau of Standards ratings as provided in the contract. Plaintiff made no written reply to this letter.

5. On May 12, 1937, plaintiff rendered an invoice covering all radiators delivered, asking payment in the amount of $35,647.16 (subject to 5 percent discount for payment within 15 days) for 176,209 5/12 square feet, computed on catalogue ratings, at the unit price of $.2023 per square foot.

6. Catalogue ratings refer to tables published by manufacturers and distributors of heating equipment wherein the capacity of radiators to emit heat (as measured by accepted formulas based upon the British Thermal Unit) is expressed in terms of square feet of heating surface. That area which will, under prescribed conditions, emit 150 British Thermal Units of heat within one hour, is listed as one square foot, entirely without reference to the number of square inches therein contained.

7. At the time of the contract in suit the Bureau of Standards computed the number of square feet in a radiator by physical measurement of the radiating surface of the radiator. It had no other basis for computing the number of square feet of radiation in a radiator.

When plaintiff put in its bid, it was aware that the Bureau of Standards was accustomed to use this basis of measurement.

8. Instructions contained in "Specifications for Standard Heating Materials, etc., for Buildings under the control of the Treasury Department," published by the Office of the Supervising Architect under date of May 1, 1931, include the following:

RADIATION

165. Especial attention is called to the fact that measurements made by the United States Bureau of Standards are used by the Office of the Supervising Architect in lieu of catalogue ratings, and it is a fact that few radiators so far measured contain the amount of superficial surface claimed in the various catalogues, and bidders must take this into account in submitting proposals.

166. The amount of radiation marked on the drawings is the amount of actual radiation which must be installed on the basis of the Bureau of Standards measurements, and not on catalogue ratings. The amount of surface installed must in no case be less than that shown on the plans for each room or section of the building.

167. The ratings at which the radiation will be accepted will be given by the Supervising Architect at time of approval of the material.

Paragraphs numbered 168 to 172, both inclusive, immediately following the paragraphs quoted above, each refer to the characteristics, design, or placing of radiators.

9. On September 30, 1937, the Procurement Division of the Treasury Department forwarded a voucher based upon plaintiff's invoice of May 12, 1937, to the General Accounting Office for direct settlement by that Office with plaintiff.

10. On December 21, 1937, the Acting Comptroller General of the United States certified $28,500.97 for payment, stating that $7,146.19, "the difference between $35,647.16, the

amount claimed, and $28,500.97, the amount herein allowed," had been "disallowed and suspended."

Of the $7,146.19 so deducted, the sum of $1,500.05 (5 percent of $30,001.02, the total price obtained by multiplying 148,299.66 square feet, Bureau of Standards measurement, by the unit price, $.2023) was "suspended pending further consideration," while the balance of the sum so deducted, $5,646.14, was disallowed—

> * * * as representing the price of 27,909.7566 square feet of radiation, the difference between the number of square feet invoiced, 176,209 5/12, and the correct number of square feet delivered as computed in accordance with the United States Bureau of Standards measurements, 148,299.66. * * *

11. Plaintiff accepted the check for $28,500.97 without prejudice to its right of review, and filed its formal request for review of the settlement with the Comptroller General on March 23, 1938.

12. Upon review and by decision dated September 24, 1938, the Acting Comptroller General sustained "the disallowance of $5,646.14 as made in the settlement of December 21, 1937," and further ruled that "the discount of $1,500.05 suspended therein will not be allowed, since the delay in accomplishing payment within the discount period resulted from the contractor's failure to compute the amount of the invoice in accordance with the terms of the contract."

13. The radiators actually delivered by plaintiff and accepted by defendant measured 148,843.66 square feet by the Bureau of Standards method of measurement, while the check for $28,500.97 which plaintiff received in the settlement of December 21, 1937 represented payment for 148,299.65 square feet, computed on the same basis. At the unit price of $.2023 per square foot, the extra 544.01 square feet would invoice at $110.05. The parties have stipulated that there is due from defendant to plaintiff on account of the foregoing the sum of $104.55 ($110.05 minus 5 percent).

The court decided that the plaintiff was entitled to recover in accordance with said stipulation.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover an amount alleged to be due

it for hot water radiation furnished the defendant on the Cincinnati Suburban Resettlement, Greenhills, project. The plaintiff claims it furnished 176,209 5/12 square feet of radiation, whereas it has been paid for only 148,299.65 square feet.

Plaintiff's computation is based on the catalogue ratings of the radiators furnished. These ratings are based on the number of British Thermal Units of heat the radiators are supposed to radiate. One hundred fifty British Thermal Units are figured as one square foot. Plaintiff furnished radiators of a capacity of 26,431,412.5 British Thermal Units. This is equivalent to 176,209 5/12 square feet based on 150 British Thermal Units being equal to one square foot. The actual physical measurement of the radiating surface in the radiators furnished was 148,843.66 square feet.

Plaintiff was paid for 148,299.65 square feet, less a discount of 5 percent. The defendant concedes that plaintiff is entitled to recover for the difference of 544.01 at $0.2023 per square foot, totalling $110.05, less the 5 percent discount.

Plainly plaintiff is not entitled to recover on its basis of computation. The contract expressly provided:

> All radiation must be furnished in accordance with the United States Bureau of Standards measurements, and not catalogue ratings.

Plaintiff's computation admittedly is based on catalogue ratings, and it is also admitted that the physical measurement of the heating surface of the radiators was 148,843.66 square feet. This was the Bureau of Standards' basis of measurement. This was admitted by plaintiff's witnesses, and they admitted they knew this when the bid was made. Their insistence was that this was not the proper basis of measurement. This is immaterial. It was the basis agreed on, proper or not.

The next question is whether or not the five percent discount should have been deducted. The invitation for bids and the bid and its acceptance form the contract. The printed form of bid recites:

> Discounts will be allowed for payments as follows: 10 calendar days------percent; 20 calendar days,------ percent; 30 calendar days------per cent.

The plaintiff struck the figure "10" in the foregoing and wrote above on the typewriter "15 days proximo" and in the blank before "percent" typed "5." The blank following "20 calendar days" remained blank, and the word "net" was typed in the blank following "30 calendar days."

The bid was made subject to the conditions on the back. Condition No. 2 reads:

> Time, in connection with discount offered, will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

Defendant says it is entitled to the discount because plaintiff never submitted a correct invoice.

It is true that plaintiff never submitted a correct invoice. On January 19, 1937, plaintiff submitted an invoice for 31,100 square feet. On the 26th of January defendant advised it that it had used catalogue ratings to figure the number of feet, and that it had delivered only 25,675 square feet based on Bureau of Standards' measurements. Plaintiff did not correct its invoice. On May 12, 1937, it submitted final invoice for all radiators delivered, including those invoiced on January 19. This was on the same incorrect basis. Plaintiff has never submitted an invoice on the correct basis.

Was this a sufficient excuse for the defendant's failure to pay the bill in fifteen days? If it was, the defendant is entitled to the discount.

Apparently the practice followed by the defendant in paying its bills varies with its several departments. Upon receipt of an incorrect bill, some of the departments will attach to it what they call a "Statement of Differences" showing the difference in the defendant's computation of the amount due and the claimant's, and forward both to the Treasury Department with an authorization to that department to pay the amount admittedly due. In others, the bill is returned to the claimant with a statement of what the defendant thinks is wrong with it, and a request that a correct bill

be submitted. If the parties are unable to agree on the amount due, no payment at all is made by the department, but the controversy is referred to the Comptroller General for settlement. In no case is payment made by the department until there is received what the department considers a correct bill.

The contract was drawn in the light of the latter practice. The submission of a correct bill being necessary before the department could or would make payment, it provided that discount time should begin to run on this date and not before.

No "correct" bill having been submitted, the defendant was entitled to the discount at the time settlement was made.

The plaintiff is entitled to recover of the defendant the sum of $104.55. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

MORRIS DEMOLITION CORPORATION v. THE UNITED STATES

[No. 44523. Decided April 5, 1943]

On Defendant's Special Answer and Plea of Fraud

Fraud; claim forfeited under the statute.—Where it is alleged, and not denied by contractor, that claimant had offered in support of its claim proof which included a false and spurious document; it is *held* that claimant attempted to practice, and did practice, fraud in the proof and establishment of its claim, and said claim is accordingly forfeited to the Government and claimant is forever barred from prosecuting it. U. S. Code, Title 28, sections 279 and 280.

The Reporter's statement of the case:

No appearance for the plaintiff.

Mr. J. H. Reddy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion *per curiam*, as follows:

Plaintiff's suit is for damages alleged to have been caused by the defendant's unreasonable delay in clearing out

its coal and other stores from a building and pier which plaintiff had contracted with the defendant to demolish and remove within a period specified in the contract. Plaintiff's amended petition states that the delay caused plaintiff to perform the contract during a winter which was one of the coldest on record, and increased its costs by $27,550.31. The original contract price, which plaintiff was paid when it completed the work, was $7,777.00.

The defendant filed a special answer asserting that plaintiff had offered proof in support of the item of its claim relating to increased costs for the removal of concrete, which proof included a false and spurious proposal from one James Capanegro, dated shortly before the date of plaintiff's contract with the defendant, and offering to remove the concrete for $1.10 per cubic yard, which was less than plaintiff ultimately had to pay to get the concrete removed. The special answer asserts that Capanegro, at the date of the supposed proposal, was not engaged in any business and was not acquainted with the plaintiff. It asserts that by reason of this offer of false proof plaintiff has, under the provisions of Sections 279 and 280 of Title 28 of the United States Code (36 Stat. 1141), forfeited its claim to the United States.

The text of Section 279 is as follows:

> Claims forfeited for fraud. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.

This statute is applicable to the conduct of plaintiff which is alleged in the defendant's special answer. Plaintiff does not deny the allegations. We find, therefore, that plaintiff attempted to practice and practiced fraud in the proof and establishment of its claim in this case. The defendant's Plea of Fraud is sustained, plaintiff's claim is forfeited to the Government, and plaintiff is forever barred from prosecuting it. It is so ordered.

HERMAN E. OSANN v. THE UNITED STATES

[No. 45047. Decided April 5, 1943]

On the Proofs

Foreign exchange; conversion of Government employee's salary under Act of March 26, 1934.—Under the Act of March 26, 1934, and pertinent regulations, Government employee traveling in foreign countries on Government business under proper orders is entitled to recover for losses sustained on that part of his salary which he had converted into foreign currency.

Same.—Claimant was paid exchange relief on his per diem allowances and under the statute and regulations is equally entitled to reimbursement for losses sustained on the conversion of his salary.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was of counsel.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon the evidence and the agreed statement of facts:

1. Plaintiff, Herman E. Osann, is a citizen of the United States and resides at 1810 Minnesota Avenue SE., Washington, D. C.

2. March 1, 1935, he was appointed a Special Investigator of the Alien Property Bureau, Claims Division, Department of Justice, which appointment he accepted on the same day.

3. June 21, 1935, the following order was issued to plaintiff:

> You are hereby authorized and directed to proceed from your headquarters at Washington, D. C., to New York City, thence to the Netherlands, Germany, Switzerland, France, Denmark, Sweden, and such other places as may be necessary, in connection with matters pertaining to Alien Property litigation and claims.
>
> You will be reimbursed your actual expenses of travel and will be allowed $5 per diem in lieu of subsistence while absent from Washington within the limits of continental United States and $6 per diem in lieu of subsistence while traveling without the limit of the conti-

nental United States, including travel on shipboard, in accordance with the rules and regulations of this Department.

Respectfully,

For the Attorney General,

GEORGE C. SWEENEY,
Assistant Attorney General.

4. Pursuant to the above order plaintiff on June 26, 1935, departed from the United States. July 5, 1935, he arrived at Plymouth, England. He thereafter remained in Europe until February 4, 1939, except for the period from October 31, 1936, to November 17, 1936, during which time he was in the United States. During the time plaintiff was in Europe he engaged in investigations for the Department of Justice in The Netherlands, Germany, Denmark, Sweden, Belgium, and stayed in each of those countries for extended periods of time.

5. March 26, 1934, the President approved the following Act of Congress (48 Stat. 466; 5 U. S. C. A. 118c):

> That there are authorized to be appropriated annually such sums as may be necessary to enable the President, in his discretion and under such regulations as he may prescribe and notwithstanding the provisions of any other Act and upon recommendation of the Director of the Budget, to meet losses sustained on or after July 15, 1933, by * * * employees of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar * * *
>
> *Provided*, That such action as the President may take shall be binding upon all executive officers of the Government: * * * *And provided further*, That the Director of the Budget shall report all expenditures made for this purpose to Congress annually with the Budget estimates.

6. December 24, 1934, the President, pursuant to the authority vested in him by the Act of March 26, 1934, *supra*, issued Executive Order No. 6928, effective as of January 1, 1935. The material parts of the Order are as follows:

> By virtue of and pursuant to the authority vested in me by the Act of March 26, 1934, Ch. 87, 48 Stat. 466, I hereby prescribe the following regulations, which shall apply to all * * * employees of the United States while in service in foreign countries:

Definition

1. The words in the Act "while in service in foreign countries" for the purpose of these regulations, shall be understood to mean (a) while employed in or on assignment or detail to a post of duty in a foreign country, (b) * * * (c) * * *, (d) while traveling in foreign countries under official orders, or (e) * * *.

Purpose of regulations

2. The purpose of these regulations is to provide for reimbursement to * * * employees of the United States * * * for losses sustained from appreciation of foreign currencies in their relation to the American dollar, as authorized under the aforesaid act.

Method of computation and payment of losses

3. (a) The loss above referred to is that calculated on the basis of conversion into foreign currency of the employee's net salary and net allowances. * * *

* * * * *

(c) In case of employees traveling in foreign countries under official orders, not employed in or on assignment or detail to a post of duty in a foreign country, no part of the employee's salary not converted for expenditure abroad shall be included in the loss referred to for the purposes of these regulations.

* * * * *

(f) In case of employees who sustained losses arising from the conversion of salaries or allowances * * * during the period from July 15, 1933, to the effective date of this order, the losses shall be calculated as provided in paragraphs (a), (b), (c), (d), and (e) of this section. Claim for reimbursement for such loss shall be accompanied by the best evidence, available to the employee, of the rate at which conversion was made.

(g) The term "net salary" means the base salary less any deductions for contributions to the retirement or other fund, or on account of percentage deductions in compensation.

The term "net allowances" means allowances paid to the employee.

Basic exchange rates for computation of losses

4. For the basis of computation of losses as referred to

in the aforesaid act, the following rates are prescribed as the basic rates for foreign countries:

Country	*Monetary Unit*	*Basic Rate*
Belgium	Belga	13.92
Denmark	Krone	24.27
France	Franc	3.92
Germany	Reichsmark	23.77
Netherlands	Florin	445.17
Great Britain	Pound	40.22
Sweden	Krona	24.40

Method of Payment to Employees

5. From and after the effective date of this order, each employee shall be entitled to receive in foreign currency such amount as he would have received by converting into such foreign currency, at the basic rates specified in section 4, his net salary and net allowances, or his net pay and allowances as provided in section 3.

7. Executive Order No. 7972, dated September 15, 1938, effective November 1, 1938, provided in part as follows:

By virtue of and pursuant to the authority vested in me by the Act of March 4, 1934, Ch. 87, 48 Stat. 466, as amended by Act of August 14, 1937, Ch. 627, 50 Stat. 641, I hereby prescribe the following regulations governing payment of losses sustained by * * * employees of the United States while in service in foreign countries on account of appreciation of foreign currencies in their relations to the American dollar.

Definition

1. (a) The words in the act "while in service in foreign countries" for the purpose of these regulations shall be understood to mean: (1) while employed in or on assignment or detail to a post of duty in a foreign country, (2) * * *, (3) * * *, (4) while traveling in foreign countries under official orders, or (5) * * *.

1. (b) The term "net salary" means the base salary, less any deductions for contributions to the retirement or other fund or on account of percentage deductions in compensation, or allotment of pay. The term "net allowances" means allowance paid to the employee, including mileage allowance and per diem allowances for dependent members of the employee's family in travel status as well as for the employee himself. * * *

Method of Computation of Payment of Losses

2. (a) The loss above referred to is that calculated on the basis of a computation of conversion into foreign currency of the employee's net salary and net allowances, except as provided in the following paragraphs.

2. (b) * * *.

2. (c) In case of employees * * * traveling in foreign countries under official orders but not employed in or on assignment or detail to a post of duty in a foreign country, all of the employee's net salary and allowances earned outside of the United States shall be included in computing the loss referred to for the purpose of these regulations. * * *

* * * * *

2. (f) In cases of employees who sustained losses arising from the conversion of salaries or allowances * * * during the period from July 1, 1933, to March 31, 1934, the losses shall be calculated as heretofore. Claims for reimbursement for such losses shall be accompanied by the best evidence available to the employee, of the rate at which conversion was made.

Miscellaneous Advisory

3. (b) Payment of currency-appreciation losses may be made either in foreign currency or in United States currency, considering only the basic rate as fixed by this order, and the rate prevailing when the right to payment accrues, * * *

* * * * *

3. (e) No losses shall be payable on salary or allowances earned or accrued while an employee is in the United States, * * *.

* * * * *

Basic Exchange Rates for Computation of Losses

(Same basic rates in effect as set forth in Executive Order No. 6928.)

Method of Payment to Employees

5. From and after the effective date of this order each employee shall be entitled to receive in foreign currency such amount as he would have received by converting into such foreign currency at the basic rates specified in section 4, his net salary and net allowances or his net pay and allowances as herein provided, * * *

Effective Date

6. This order shall take effect, except as otherwise provided herein, on the first day of the second month following the month in which this order is approved, and the heads of the executive departments are hereby authorized to issue such instructions to carry out the provisions of this order in their respective departments as may be necessary to conform to the accounting procedure of such departments.

* * * * *

8. In his statements submitted to the Alien Property Bureau for reimbursement of travel expense, plaintiff claimed reimbursement for losses sustained on the conversion of his per diem allowance, and he was paid for these losses.

9. After returning to the United States, plaintiff, on March 4, 1939, filed his claim with the Claims Division of the Department of Justice for reimbursement of the losses he had sustained on that part of his official salary which he had converted into foreign currencies for expenditure abroad. This claim was disallowed on April 6, 1939.

10. Plaintiff, during the period from July 4, 1935, to February 4, 1939, while performing the duties of his office in various European countries, sustained an actual loss of $3,784.64 on that portion of his official salary which he converted into foreign currencies for expenditure abroad.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

March 26, 1934, the President approved an act of Congress (48 Stat. 466, 5 U. S. C. A. 118 (c)) authorizing the appropriation annually of such sums as might be necessary to enable the President in his discretion and under such regulations as he might prescribe to meet losses sustained on or after July 15, 1934, by officers, enlisted men and employees of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar. The act provided that such action as the President might take would be binding upon all executive officers of the government.

Pursuant to the authority vested in him by the act, the President issued regulations setting out the conditions for recovery. The only ones here material are those contained in Executive Orders 6928 and 7972, issued December 24, 1934, and September 15, 1938, respectively. Executive Order 6928 defined the phrase "while in service in foreign countries," as used in the act, to include "while traveling in foreign countries under official orders." The order provided methods for calculating the loss sustained in various circumstances and in the case of an employee traveling in foreign countries under official orders, not employed in or on assignment or detail to a post of duty in a foreign country, only that part of the employee's salary converted for expenditure abroad could be included in the loss. The order prescribed the basic exchange rates for various foreign currencies to be used in computing losses.

Executive Order 7972 was a revision of the earlier regulations, as amended from time to time. The only material change, so far as plaintiff's case is concerned, was a provision that employees traveling in foreign countries under official orders, not employed in or on assignment or detail to a post of duty in a foreign country, might include all of their net salary and allowances earned outside of the United States in computing their losses.

So far as appears, none of the regulations set out any particular requirements for filing claims for reimbursement.[1]

Plaintiff was on March 1, 1935, appointed a Special Investigator of the Alien Property Bureau, Claims Division, Department of Justice. From July 4, 1935, to February 4, 1939, except for the period from October 3, 1936, to November 17, 1936, plaintiff was traveling under official orders in the Netherlands, Germany, Denmark, Sweden and Belgium. After he returned to the United States, he filed a claim on March 4, 1939, with the Claims Division of the

[1] The only reference to the filing of a claim is found in the provision of Executive Order 7972 that in the case of losses sustained during the period from July 1, 1933, to March 31, 1934 (the date of the first Executive Order setting out the rates of exchange to be used), the loss should be calculated as provided therein and the claim for reimbursement should be accompanied by the best evidence available to the employee of the rate at which conversion was made. A similar provision was in Executive Order 6928.

Department of Justice for reimbursement of losses sustained on that part of his salary which he had converted into foreign currency. The claim was disallowed and no reason was given for the disallowance. It is agreed that the loss amounted to $3,784.64.

There are no reported cases involving the statute and regulations. Plaintiff contends that it is clear from reading the Executive Orders involved that he is entitled to recover. The defendant has advanced no reasons why plaintiff is not entitled to recover. Apparently there are none. Plaintiff has met the conditions prescribed in the regulations for reimbursement. He claimed and was paid exchange relief on his per diem allowances. He is equally entitled under the act and regulations to reimbursement for the losses sustained on the conversion of his salary. Plaintiff is entitled to recover $3,784.64.

It is so ordered.

INSULAR SUGAR REFINING CORPORATION v. THE UNITED STATES

[No. 45062. Decided April 5, 1943. Plaintiff's motion for new trial overruled June 7, 1943]*

On the Proofs

Floor stocks tax imposed by Agricultural Adjustment Act, recovery of; sufficiency of evidence to show tax not passed on.—Evidence *held* insufficient to show taxpayer had not passed on tax.

Same.—A showing that claimant sold its floor stocks sugar at prices less than the market value thereof as of June 7, 1934, the day prior to the effective date of the floor stocks tax, plus the tax, is insufficient to show that claimant bore the burden of the tax. *United States* v. *Cheek*, 126 F. (2d) 1; *Colonial Milling Co.* v. *Commissioner*, 132 F. (2d) 505, cited. *Cones* v. *United States*, 123 F. (2d) 530, distinguished.

Same.—A showing that claimant sustained a net loss over a certain period including the effective period of the floor stocks tax is not sufficient to show plaintiff did not pass on the amount of the tax where plaintiff does not negative the possibility that such losses might be attributable to other causes, such as a considerable decrease in the selling price of its product and a considerable increase in its costs.

*Petition for writ of certiorari denied October 11, 1943.

Same.—Where all of claimant's floor stock on hand on the effective date of the floor stocks tax, June 8, 1934, had been disposed of by March 1935, but the period in which claimant realized its loss did not end until November 30, 1935, eight months later; and where it is not shown whether the loss occurred from October 1934 to March 1935, during which the floor stock subject to tax was sold, or in the remaining eight months; it is *held* that such proof is not sufficient to show that claimant did not pass on the floor stocks tax which it sues to recover. *McClung* v. *United States*, 92 C. Cls. 275.

The Reporter's statement of the case:

Mr. J. Sterling Halstead for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. The Insular Sugar Refining Corporation, plaintiff in this case, was incorporated in 1929 under the laws of the Philippine Islands, with its principal office in Manila.

During the period involved in the present case plaintiff was engaged in refining sugar in the Philippine Islands and selling its refined product both in the Philippine Islands and in the United States. Balfour, Guthrie & Co., Ltd., was agent for plaintiff in the United States, with its principal office at San Francisco and branch offices located in Los Angeles, Seattle, Portland, and Tacoma.

2. Plaintiff's sugar was sold by all the branch offices of Balfour, Guthrie & Co., Ltd., on the basis of an f. o. b. San Francisco sales price plus a freight differential. The freight differential added at the Los Angeles office was 13 cents per 100-lb. bag; at Portland, 20 cents, and at Seattle and Tacoma, 22½ cents. These freight differentials did not represent freight actually paid but were an addition to the sales price as plaintiff's sugar was usually shipped direct to the respective offices from Manila.

A two percent discount was allowed in the case of practically all sales based on the f. o. b. San Francisco price.

3. Most of plaintiff's sales of sugar were made on the basis of so-called bulk sugar in which the sugar was sold in bags containing 100 pounds.

The plaintiff also sold sugar in the form of "pockets." In this form the sugar was packaged in small containers of two, five, ten, or twenty-five pounds each, which were in turn packed in bags containing a total of 100 pounds each. The sugar sold in this form had an added charge for the cost of labor and materials necessary to pack the sugar in the small containers.

All of plaintiff's sales were made on the basis of a 100-lb. bag, whether this was bulk sugar or pocket sugar, and the term "bag" as used in the subsequent findings has reference to a bag containing 100 pounds.

4. On the first moment of June 8, 1934, the effective date of the floor stock tax, plaintiff owned 521,203 bags of sugar which it had refined and shipped to the United States prior to that date and which was then in the possession of its agent, Balfour, Guthrie & Co., Ltd.

The current market value of this sugar on a bulk basis per 100-lb. bag (eliminating material costs and labor costs of pockets) on June 7, 1934, as established by sales on that date and just prior thereto, was as follows:

	VALUE F. O. B. SAN FRANCISCO	VALUE 2% DISCOUNT PLUS FREIGHT DIFFEREN-TIAL
Los Angeles	$3.95	$4.001
Portland	3.90	4.022
San Francisco	4.00	3.92
Seattle and Tacoma	3.9643	4.11

5. The floor stock tax which became effective on June 8, 1934 was in the amount of $.535 per 100-lb. bag.

On this date the plaintiff through its agent increased its quotation price of sugar by the amount of 55 cents per bag. Plaintiff's competitors raised their prices on the same day and in the same amount. Plaintiff's agent, Balfour, Guthrie & Co., Ltd., did not know the cost of plaintiff's sugar and could not use such cost in fixing sales prices.

The increase of 55 cents per bag when subjected to the normal 2% discount resulted in a net price increase of 53.9 cents per bag.

6. Plaintiff's sugar contracts with certain canners and manufacturers for the sale of 91,422 bags of sugar, which contracts were made prior to April 25, 1934, contained a clause either the same as or substantially similar to the following:

> Imposition of a Federal or State tax on sales or any Federal or State tax that may be enforced during the life of this contract to be for the account of the buyers.

Deliveries under these contracts were made subsequent to June 8, 1934 and out of the inventory on hand at that time, but plaintiff paid no floor stocks tax on this portion of its inventory.

Three of the contracts entered into by plaintiff on February 6, 1935 for the sale of its last floor stock tax-paid sugar contained the following tax clause:

> The above price is based on Government Processing Tax at the rate of 53½ cents per 100 pounds, and any change in this tax to be for the account of buyers.

7. Between June 8, 1934, and approximately April 1, 1935, no shipments were received from plaintiff by Balfour, Guthrie & Co., Ltd., for sale on the Pacific Coast, and all of plaintiff's sales of sugar during this period were made out of plaintiff's June 8, 1934, inventory.

Insofar as the present issue is concerned the number of bags upon which the plaintiff paid a floor stock tax was as follows:

Los Angeles office	88,363
Portland office	85,606
San Francisco office	115,894
Seattle & Tacoma office	146,032
	435,895

The tax thus paid at $0.535 per 100-lb. bag totaled $233,203.83.

Plaintiff did not bill the floor stock tax as a separate item on its invoices to any of its purchasers of the above listed sugar.

8. Plaintiff purchased raw sugar from many different producers and mills in the Philippine Islands and intermingled such purchases in its warehouses. A substantial portion of its raw sugar was purchased from planters under contracts calling for future delivery at a price to be fixed by the seller at a later date. Because of this intermingling and this method of purchasing, it was impossible for plaintiff to know the cost of any particular lot of refined sugar forming part of its floor stock tax inventory on June 8, 1934.

The aggregate market value of plaintiff's floor stock on June 7, 1934, based upon the inventory of 435,895 bags and the per unit values and including the 2% discount and the freight differentials as set out in Finding 4, was as follows:

Los Angeles Office	$353, 540. 36
Portland Office	344, 307. 33
San Francisco Office	454, 304. 48
Seattle and Tacoma Offices	600, 191. 52
Total	$1, 752, 343. 69

9. The June 7, 1934 market value as given in Finding 8 plus the floor stock tax at $0.535 a bag, was as follows:

	BAGS	JUNE 7, 1934 VALUE, PLUS TAX
Los Angeles	88, 363	$400, 814. 57
Portland	85, 606	390, 106. 54
San Francisco	115, 894	516, 307. 77
Seattle and Tacoma	146, 032	678, 318. 64
	435, 895	1, 985, 547. 52

10. In the period between June 8, 1934 and March 1935 plaintiff sold the 435,895 bags of sugar herein involved. The following tabulation shows the monthly sales and the amounts realized therefrom eliminating costs of "pockets" and reduced to a bulk basis.

Due to market fluctuations the amount realized in certain months was less than the June 7, 1934 value plus the tax. The amounts of this minus difference are tabulated in the last column:

PERIOD	SALES OF FLOOR STOCKS ON BULK BASIS		VALUE OF FLOOR STOCKS JUNE 7, 1934 PLUS TAX	MINUS DIFFERENCE
	BAGS	AMOUNT		
LOS ANGELES				
1934—June 8-30	2,478	$11,378.47	$11,240.21	----------
July	9,984	44,754.99	45,287.42	$532.43
August	11,533	52,143.14	52,313.69	170.55
September	7,908	35,231.81	35,870.69	638.88
October	11,035	48,400.16	50,054.76	1,654.60
November	7,079	29,845.54	32,110.34	2,264.80
December	11,658	51,545.84	52,880.69	1,334.85
1935—January	6,869	29,137.78	31,157.79	2,020.01
February	7,514	31,586.50	34,083.50	2,497.00
March	12,305	52,182.71	55,815.48	3,632.77
PORTLAND				
1934—June 8-30	5,005	$21,789.63	$22,807.79	$1,018.16
July	14,115	65,071.44	64,322.05	----------
August	14,596	69,922.68	66,513.97	----------
September	12,815	58,614.05	58,397.95	----------
October	7,875	37,212.49	35,886.38	----------
November	1,095	4,682.06	4,989.91	307.85
December	5,145	22,737.69	23,445.77	708.08
1935—January	9,310	38,537.60	42,425.67	3,888.07
February	10,252	43,234.14	46,718.36	3,484.22
March	5,398	22,853.36	24,598.69	1,745.33
SAN FRANCISCO				
1934—June 8-30	510	$2,189.39	$2,272.05	$82.06
July	10,124	45,159.75	45,102.42	----------
August	14,568	64,153.57	64,900.44	746.87
September	13,361	59,391.80	59,523.26	131.46
October	25,502	108,024.11	113,611.41	5,587.30
November	3,217	13,752.43	14,331.74	579.31
December	10,179	43,979.73	45,347.44	1,367.71
1935—January	27,709	114,087.56	123,443.59	9,356.03
February	9,138	36,844.95	40,709.79	3,864.84
March	1,586	6,157.46	7,065.63	908.17*
SEATTLE AND TACOMA				
1934—June 8-30	9,032	$45,999.99	$41,953.64	----------
July	42,927	200,360.62	199,395.92	----------
August	25,709	118,557.66	119,418.30	$860.64
September	28,383	134,023.71	131,839.04	----------
October	10,146	47,075.87	47,128.17	52.30
November	4,062	18,559.16	18,867.99	308.83
December	3,404	15,543.02	15,811.58	268.56
1935—January	4,564	16,878.54	21,199.78	4,321.24*
February	6,501	28,033.26	30,197.14	2,163.88
March	11,304	47,599.22	52,507.08	4,907.86
	435,895	1,937,233.88	1,985,547.52	61,405.26

11. In the above tabulation the two items indicated by an asterisk in the column entitled "Minus Difference" exceed the amount of the floor stock tax as indicated below:

	TAX AT $.535	MINUS DIFFERENCE	EXCESS
1,586 bags	$848.51	$908.17	$59.66
4,564 bags	2,441.74	4,321.24	1,879.50
Total excess			1,939.16

12. Subtracting the excess of $1,939.16 given in Finding 11 from the total of the "Minus Difference" column of the tabulation, $61,405.26 (Finding 10) leaves the sum of $59,466.10.

This figure represents the difference between what the plaintiff received in its monthly sales on which it realized no profit and what it would have realized had the sales price at all times been equal to the June 7, 1934 market value of the sugar plus the floor stock tax, with the difference so corrected that in no month it exceeded the floor stock tax.

Plaintiff claims such an amount as representative of the extent to which it absorbed the floor stock tax.

13. An audit made by income tax representatives of the defendant showed that plaintiff in its operations during the fiscal year ending September 30, 1933 earned profit from its operations amounting to $359,522.94. Said audit further showed that for the fiscal year ended September 30, 1934, during the last three months of which plaintiff was paying floor stock taxes, plaintiff's profit was $139,122.68, and that during the fiscal periods October 1, 1934 to September 30, 1935, and September 30, 1935 to November 30, 1935, during which plaintiff was paying both floor stock and processing tax, it sustained a loss of $56,763.09.

14. There is no evidence to show that the market fluctuations, resulting in plaintiff's receiving $59,466.10 less than the June 7, 1934 value plus tax from the sale of its tax-paid floor stock sugar, were due to the tax nor to show they would not have occurred had there been no tax.

In the case of the two items indicated by an asterisk in the tabulation set forth in Finding 10 plaintiff's loss exceeded the amount of the floor stock tax.

15. On June 25, 1937, plaintiff filed a claim for the refund of floor stock taxes with the Collector of Internal Revenue,

which claim was subsequently amended by plaintiff on December 28, 1939. On January 9, 1940, the Commissioner of Internal Revenue rejected the claim so filed and advised plaintiff of such rejection.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover floor stock taxes levied by the Agricultural Adjustment Act, which Act was later declared unconstitutional by the Supreme Court of the United States in *United States* v. *Butler*, 297 U. S. 1.

Under the provisions of section 902 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, the plaintiff is entitled to recover the amount of such taxes paid, but only if it is able to carry the burden of showing that it "bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly * * *." The question presented is whether or not plaintiff's proof is sufficient to show this.

The plaintiff first says that it has shown that it bore the burden of the tax by showing that it sold its floor stock sugar at prices less than the June 7, 1934 market value thereof plus the tax. When the tax became effective plaintiff added to the June 7, 1934 market price the amount of the tax, and for the month of June its Los Angeles office received this value plus the tax. Thereafter, that office received varying amounts less than this value plus the tax. Its Portland office failed to realize during the month of June the June 7, 1934 value plus tax, but it did get this price during the months of July, August, September, and October. Thereafter it received amounts less than this value plus the tax. The San Francisco office received the June 7, 1934 value plus tax in only two months, and the Seattle and Tacoma office received it in only four months; in other months those offices received less than this value plus tax.

This, however, is insufficient to show that plaintiff bore the burden of the tax. It falls short of a showing that the plaintiff did not recover its cost plus tax, which the Circuit

Court of Appeals for the Sixth Circuit has held was sufficient to show it had borne the burden. *United States* v. *Will T. Cheek*, 126 F. (2d) 1; *Colonial Milling Co.* v. *Commissioner*, 132 F. (2d) 505. At plaintiff's request we have found as a fact that it was unable to show the cost of its floor stocks. Unless it shows at least that it has not recovered its costs plus tax, it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers.

In the case of *C. B. Cones & Son Mfg. Co.* v. *United States*, 123 F. (2d) 530, (7th C. C. A.), relied upon by plaintiff, the court held that plaintiff had carried the burden of showing that it had not passed the tax on, notwithstanding the fact that it had increased its selling cost on the date of the incidence of the tax by an amount more than sufficient to take care of the tax. It appeared in that case that there had been an increase in the market price of the plaintiff's raw materials from 8 cents a yard to 17 cents, including the processing and floor stock taxes of 2¼ cents a yard. Plaintiff increased the price of its finished product so as to take advantage of this increase in price of its raw material to the extent of 6¾ cents a yard. The court found it did not increase it by the additional 2¼ cents a yard, which was the amount of the floor stock tax. The court held that, since it was shown that plaintiff had not increased its price by the amount of the floor stock tax, but only by the increase in market value exclusive of this tax, it had borne the burden of showing that it had not passed the tax on.

That case, however, differs from the one at bar in that here it is expressly shown that plaintiff did increase its price by the amount of the tax, and got the increased price a part of the time, at least. It may or may not have continued to get the amount of the tax, depending upon whether or not the June 7, 1934 market value sufficiently exceeded the cost of its sugar plus operating and selling expenses. Whether or not this is so, we do not know.

The decision in the *Cones* case is not in harmony with the decisions in *Luzier's, Inc.* v. *Nee, Collector of Internal Revenue* (8th C. C. A.), 106 F. (2d) 130, and *Honorbilt Products, Inc.* v. *Commissioner* (3rd C. C. A), 119 F. (2d)

797, and in *United States* v. *Poindexter & Sons Merchandise Co.* (8th C. C. A.), 128 F. (2d) 992. In the latter case the respondent had increased the price of its merchandise coincident with the effective date of the tax. It showed, however, and the trial court found, that this increase was motivated by reasons other than passing the tax on, but, notwithstanding this, the Circuit Court of Appeals held that the plaintiff was not entitled to recover inasmuch as it had not shown "that the amount to which it increased its selling prices was insufficient to cover its former selling prices of the articles plus the amount of the tax assessed and paid in respect to them, or that it did not realize normal profits after the tax was paid." The court's holding is summarized in the following quotation:

> But where they immediately increased their prices sufficiently to cover the former prices of the articles plus the amount of the tax, they manifestly shifted the burden to the customers.

In this case the plaintiff increased the price of its goods 53.9 cents coincident with the date the tax of 53.5 cents became effective. A part of the time it got this price. A part of the time it could not get it, but whether the price it did get was below cost plus tax, we do not know. We are of opinion that, in line with the above cited decisions of the Circuit Court of Appeals for the 6th Circuit in the *Cheek* and *Colonial Milling Company* cases, plaintiff must go this far, at least.

The plaintiff's second proposition is that it could not have passed the tax on because during the period the tax was in effect it sustained a net loss of $56,783.09. Plaintiff in its brief does not negative the possibility that this loss might have resulted from some extraordinary circumstance not connected with the ordinary operation of the business, such as fire, shipwreck, etc., but an examination of the schedules filed showing its income and expenses for the period in question shows nothing to which this loss might be attributable other than a considerable decrease in the selling price of sugar and a considerable increase in the cost of goods sold, as well as a smaller increase in other operating expenses of the business.

However, the period within which plaintiff sustained this loss runs from October 1, 1934 to November 30, 1935. During this period plaintiff disposed of the remaining 212,847 bags of the floor stock on hand on June 8, 1934, whereas the total number of all bags sold throughout the period was 1,113,681. Whether or not the loss was sustained on these 212,847 bags or on the other bags sold, is not shown; nor is it shown that the loss was ratable.

All of plaintiff's floor stock on hand on June 8, 1934 had been disposed of by March 1935; but the period in which plaintiff realized the loss did not end until November 30, 1935, eight months later. Whether the loss occurred from October 1934 to March 1935, during which the floor stock was sold, or in the remaining eight months, plaintiff has not shown. Clearly such proof is not sufficient to show that plaintiff did not pass on the floor stock taxes which it sues to recover. Cf. *McClung* v. *United States*, 92 C. Cls. 275 (35 F. Supp. 464).

We are of the opinion that the plaintiff has not successfully carried the burden of showing that it itself bore the burden of the tax and did not pass it on to its customers. To say the least, it tried to pass it on; it has not shown that it did not succeed.

It results that plaintiff is not entitled to recover. Its petition will be dismissed. It is so ordered.

MADDEN, Judge; LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

KATHARINE C. PIERCE AND WILLIAM CURTIS PIERCE, AS EXECUTORS OF THE ESTATE OF HENRY HILL PIERCE, DECEASED v. THE UNITED STATES

[No. 45268. Decided April 5, 1943]

On the Proofs

Income tax; gain or loss on sale of security company stock locked with bank stock at time of purchase.—Gain or loss from sale of declaration of taxpayer's interest in security company in dissolution may not be ascertained for tax return purposes until sale

of stock in bank to which taxpayer's interest in security company was locked by trust agreement at the time of purchase.

Same.—Where bank stock carried with it ratable interest in investment company dealing in securities that were unlawful for banks; and where bank's officers and directors held all outstanding investment company shares as trustees for each bank shareholder; and where, pursuant to the Bank Act of 1933 (48 Stat. 162), separation of bank and investment company was effected, and each shareholder upon dissolution of investment company received ratably "declarations of interest" in said company; bank shareholder's interest in investment company was not so separate from his holding of shares in bank as to make sale of "declarations of interest" a "realizable loss" deductible from income. *De Coppet* v. *Helvering*, 108 Fed. (2d) 787, cited.

Same.—Where, at time of purchase, no reasonably exact value can be assigned to taxpayer's interest in security company affiliate of bank where such interest is represented by endorsement on bank stock certificate showing that such interest is locked with interest in bank stock under stockholders' trust agreement; and where loss is claimed for tax purposes on sale of taxpayer's certificate of interest in security company upon liquidation, no apportionment of value of interest in security company and interest in bank should be attempted; since the exact answer to the question of profit or loss may be obtained by waiting until the bank stock also is sold.

Same.—The fact that two pieces of property are locked together by a valid restraint on alienation, so that at the time of purchase one cannot be sold without the other does not necessarily mean that if later, after the restraint has been removed, one is sold without the other a taxable profit or a deductible loss may not follow; but the locking device increases the practical difficulty of attributing a correct valuation to either piece of property as of the time of purchase, since the very fact of the restraint usually affects the value of the combination and of each of its components in amounts difficult to measure. See *Wise* v. *Commissioner*, 109 Fed. (2d) 614; also *De Coppet* v. *Helvering*, 108 Fed. (2d) 787; *Hagerman* v. *Commissioner*, 102 Fed. (2d) 281.

The Reporter's statement of the case:

Mr. Lawrence A. Baker for the plaintiffs. *Mr. John A. Selby* and *Baker, Selby & Ravenel* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs (citizens of the United States and residents of the State of New York) are the executors under the last will and testament of Henry Hill Pierce, deceased, who was a citizen of the United States and a resident of the State of Maine.

2. At all times since February 1908, the First National Bank of the City of New York (hereinafter referred to as the "Bank") has been a corporation organized and existing under and by virtue of the National Banking Act and has had outstanding 100,000 shares of stock of a par value of $100 each.

3. The Bank was limited by law in its power to acquire and to hold real estate, securities, stocks, and other property, and its officers, directors, and stockholders, desiring to avoid the inconvenience and supposed loss resulting from such limitation of the corporate powers, were advised that they might do so legally by the formation of a business corporation which would have such powers. February 14, 1908, an agreement was entered into between the officers of the Bank, as trustees, and the stockholders of the Bank for the preparation and consummation of a plan for the organization of a business corporation under the following terms and conditions:

(*a*) The corporation to be known as First Security Company (hereinafter sometimes referred to as the "Security Company") and to have a capital stock of $10,000,000 divided into 100,000 shares each of the par value of $100.

(*b*) Subscription for the capital stock of the Security Company by the trustees as joint tenants, that stock to be held by and be registered on the books of the Security Company in the names of the directors or officers of the Bank or its successor and those persons to exercise all the rights and powers of absolute owners over such stock in trust.

(*c*) The stock of the Security Company was to be paid for by the trustees out of a special or extra dividend to be declared on the shares of the Bank in the sum of $10,000,000.

(*d*) To enable the trustees to acquire the capital stock of the Security Company in that manner, each and every stockholder of the Bank and subscriber to the agreement

assigned, transferred, and set over to the trustees as joint tenants all his right, title, and interest in and to such extra or special dividend to be used and applied in making payment for the stock of the Security Company.

(*e*) Each stockholder agreed upon organization of the Security Company to present to the trustees his certificate of stock in the Bank for endorsement as follows:

> The registered holder of the within certificate is entitled, for and in respect of each and every share of stock of the First National Bank of the City of New York represented thereby, to share equally and ratably with all other holders of stock certificates of the Bank similarly endorsed, according to their several interests, in the dividends or profits, and, in case of dissolution, in the distribution of the capital, of the First Security Company, a corporation of the State of New York organized in pursuance of a certain written agreement dated February 14th, 1908, between George F. Baker and others, Trustees, and J. Pierpont Morgan and others, Stockholders: such interest of the owner of the within certificate, and of all other like certificates, similarly endorsed, being subject to all the terms, conditions, and limitations of said agreement; such ratable interest to be sold or transferred ratably only by the transfer upon the books of the Bank of one or more of the shares of the stock in the Bank represented by a Bank stock certificate bearing this endorsement; and all of the interest in and to or in respect of said Security Company or its capital stock, represented by a Bank stock certificate bearing this endorsement, shall pass ratably with and only with the transfer of such shares of the Bank represented by such Bank stock certificate, and upon transfer thereof upon the books of the Bank; and an interest in the Security Company attached to any share of the Bank shall be alienable, only in connection with such transfer of such Bank stock.
>
> No holder of the within certificate or any transferee of any share thereby represented shall be entitled in lieu thereof to demand or receive from the Bank a new certificate except with this endorsement thereon; and a transfer of any share of Bank stock represented by the within Bank stock certificate shall be made by any holder thereof only to a transferee accepting therefor a new certificate bearing this endorsement.
>
> No right to vote upon or in respect of any stock of

the Security Company passes to or shall be exercised by the holder of the within certificate, such voting right being reserved to and by the Trustees or their successors.

(*f*) From and after the placing of the endorsement upon the certificates the registered holders were to be invested with such rights in respect of the Security Company or of its capital stock as were indicated in the agreement and the endorsement.

(*g*) The trustees agreed to accept assignment of the special dividend and to make payment therewith for the capital stock of the Security Company; to exercise all the rights and powers of owners thereof except insofar as they should receive express directions in writing signed by the holders of at least two-thirds interest in the certificates of stock of the Bank then outstanding.

(*h*) The trustees further agreed that when, as stockholders of the Security Company, they received dividends either from the profits of the company or upon final dissolution thereof, they would pay the same over to the Bank or its successor for immediate distribution by the Bank to and among the holders of the Bank stock certificates and according to their interest in the shares of the Bank. They further agreed that if for any reason it should become impracticable to distribute Security Company dividends through the agency of the Bank the trustees themselves would distribute such dividends, as and when received, to the persons who would be entitled to the same if the distribution thereof were made by the Bank.

(*i*) The agreement was to continue and be in full force and effect for five years and thereafter until the same should be terminated by the written directions of the holders of two-thirds interest in the stock certificates of the Bank or its successor.

(*j*) Upon termination of the agreement the shares of the stock of the Security Company were to be distributed ratably to and among the holders of record of the stock certificates of the Bank.

4. In accordance with the agreement referred to in the preceding finding, the First Security Company was organized on February 14, 1908, under the laws of the State of

New York, with a capital stock of $10,000,000 divided into 100,000 shares of a par value of $100. A special dividend of $10,000,000 was declared out of the surplus or net profits of the Bank in May 1908, and was thereupon assigned and paid to the trustees who used it to pay for the capital stock of the Security Company. All the stockholders of the Bank presented their certificates for endorsement as provided in the agreement, and the Security Company began to operate the business for which it was organized.

5. At all times after February 14, 1908, and until the termination of the agreement on November 29, 1933, the agreement was in full force and effect and each certificate of Bank stock bore the endorsement heretofore referred to. The owner of such certificate could not sell separately either his interest in the Bank as represented by such certificate or his interest in the Security Company as similarly represented, but could sell only his combined interest in both companies.

6. On the dates and at the cost set out below, plaintiffs' decedent purchased shares of Bank stock bearing the endorsement referred to in finding 3 (e):

Date	Number of shares	Unit price	Total cost
April 16, 1928	15	$3,875	$58,125
March 22, 1930	15	5,905½	88,580
November 23, 1932	5	1,625	8,125

7. Because the Federal Banking Act of 1933 required national banks to divorce their securities affiliates, the Security Company was on November 29, 1933, dissolved in accordance with the laws of the State of New York. Subsequently on the same day the trust created under the agreement of February 14, 1908, was terminated. Thereafter declarations of interest in the distribution of proceeds of dissolution of the Security Company were issued by the trustees under the agreement to the stockholders of the Bank in lieu of the endorsement, which endorsement was then removed from the Bank stock certificates. The declarations of interest contained the following provisions:

The undersigned, holders as Trustees of stock of First Security Company, a New York corporation, in dissolution, standing in the name of:

"Trustees under Agreement dated February 14, 1908, between George F. Baker and others, Trustees, and J. Pierpont Morgan and others, Stockholders."

hereby declare that ________________________________ is entitled to an interest of __________________ undivided parts of a total of one hundred thousand (100,000) parts, in the distribution of the proceeds of the dissolution of said First Security Company, as such proceeds from time to time may hereafter be distributed to the undersigned, and the survivors and survivor of them, as stockholders thereof, as such Trustees, by the Directors of said First Security Company in the progress of the dissolution thereof.

This Declaration of Interest and the rights and interests represented hereby are transferable by the registered owner hereof in person or by attorney thereunto duly authorized, by transfer upon the books kept for that purpose by the agent of the undersigned and upon the surrender of this Declaration of Interest properly endorsed.

Title to this Declaration of Interest when duly endorsed may be passed and shall vest with the same effect as in the case of negotiable instruments, and each holder hereof consents and agrees that any delivery hereof, when duly endorsed in blank, shall transfer the title hereto and all rights and interests represented hereby to the same extent, for all purposes, as would delivery under like circumstances of a negotiable instrument payable to bearer. The undersigned Trustees and their agents may treat the registered holder hereof (or, if duly endorsed in blank, the bearer hereof) as the absolute owner hereof for all purposes, including the payment of such money and/or delivery of such security or other property as may be received by them for distribution in the progress of such dissolution, provided, however, that as a condition of making any such distribution hereon the undersigned may, in their discretion, require the transfer hereof to the name of such bearer on said books and/or the presentation hereof for the purpose of notation of each such distribution upon the reverse hereof.

An interest in the proceeds of dissolution of one undivided part of a total of 100,000 parts was issued for each of the

100,000 shares of Security Company stock previously represented by the endorsement on the back of the Bank stock certificates.

No actual or constructive distribution of the assets of the Security Company in dissolution was made prior to January 30, 1934. The proceeds of liquidation of the Security Company amounted to $2,018,523.82 and were delivered in liquidation to the trustees on or after January 30, 1934.

8. Upon the dissolution of the Security Company and termination of the agreement, plaintiffs' decedent received on December 6, 1933, declarations of interest for thirty-five undivided parts in the distribution of the proceeds in dissolution of the Security Company and certificates for thirty-five shares of Bank stock without the endorsement, upon his surrender of the certificates of the Bank stock bearing that endorsement which he had purchased on April 16, 1928, March 22, 1930, and November 23, 1932, as shown in finding 6. On January 29, 1934, plaintiffs' decedent sold those declarations of interest of thirty-five undivided parts for $577.50—that is, at the rate of $16.50 for each declaration of interest.

9. At all times herein referred to the Security Company was operated as an investment company and its assets consisted principally of high-grade stocks together with small amounts of bonds, loans, and cash. Investments were always made with a view to long-term appreciation and yield rather than to trading profits and consequently its income consisted principally of dividends.

10. During the entire period of its existence the directors of the Security Company were in all material respects the officers and directors of the Bank so that the Security Company enjoyed the benefits of the same management as the Bank. From 1908 until 1933 the few investments acquired from the Bank were taken over at the fair market value thereof at the time of transfer. All loans by the Bank to the Security Company were at rates of interest at least as high as the prevailing rates for comparable loans, and were adequately secured. The most exacting requirements were observed in regard to these loans with even higher rates of interest charged in some instances than to other customers of the Bank.

11. During the entire period of the existence of the Security Company no rights to subscribe to additional stock nor stock dividends were issued by either the Bank or the Security Company and the capital of the Bank and Security Company remained the same from 1908 until the dissolution of the Security Company in 1933. The Security Company did no underwriting, with possibly one exception, and did not buy or sell stocks or otherwise engage in speculation. It sometimes borrowed money from the Bank to purchase common stock for long-time holding but such loans conformed to the practice set out in finding 10.

12. At all times from the formation of the Security Company the earnings of the Bank and of the Security Company were separately computed. The earnings of the Bank for the year 1927 were $11,850,000, while the earnings of the Security Company for the same year were $6,411,000. In 1929 the earnings of the Bank were $12,675,000, while the earnings of the Security Company were $6,366,000. In 1932 the earnings of the Bank were $6,446,000. In that year the Security Company sustained a loss of $372,000.

13. Dividends were at all times separately paid by the Bank and the Security Company to the holders of shares of the Bank. In 1927 the Security Company paid dividends of $3,500,000, the Bank, $6,500,000. In 1929 the Security Company paid dividends of $8,000,000, the Bank, $2,000,000. In 1932 the Bank paid dividends of $10,000,000, and none were paid by the Security Company.

14. The balance sheets of the Bank and of the Security Company showed assets in the amounts set out below at the dates mentioned:

	Apr. 30, 1928	Mar. 31, 1930	Nov. 30, 1932
Bank	$475,011,102.60	$495,909,395.66	$517,982,563.96
Security Co.	66,361,837.82	70,324,516.88	60,737,476.03

The net asset values exclusive of goodwill and other intangibles, if any, of the Bank and of the Security Company and the percentage of the combined net asset value which such value of each represented on the dates of purchase by plaintiffs' decedent were as follows:

Date	Net asset value Bank	Net asset value Security Co.	Combined net asset value Bank & Security Co.	Percent Bank	Percent Security Co.
4/16/28	$111, 864, 719. 41	$73, 377, 867. 29	$185, 242, 586. 70	60. 388	39. 612
3/22/30	125, 718, 172. 71	72, 255, 172. 88	197, 973, 345. 59	63. 502	36, 498
11/23/32	89, 023, 517. 49	−8, 275, 405. 41	80, 748, 112. 08	110. 248	

These net asset values represented the amounts by which the respective assets of the Bank and the Security Company, at their fair market value, exceeded their respective liabilities, exclusive of capital stock.

The reports of the condition of the Bank at the close of business April 30, 1928, March 31, 1930, and November 30, 1932, contain no reference to the Security Company. The Security Company never made public any information concerning its assets, liabilities, earnings, or sources of income.

15. The Bank stock has been actively traded in by unlisted security dealers and brokers on the so-called "over the counter" market since prior to 1908. From the formation of the Security Company until its dissolution, all certificates of Bank stock which were sold bore the endorsement heretofore referred to, and all quotations or prices of Bank stock were for certificates of such stock bearing that endorsement. Quotations or prices of Bank stock from 1903 to 1908, a period prior to the formation of the Security Company, and from 1908 to 1933, the period of the existence of the Security Company, are set out in Exhibits F and G, attached to the stipulation filed in this case, and are made a part hereof by reference. The bid and asked prices for the Bank stock on January 4, 1908, were $570 and $600, respectively, and on April 4, 1908, after the formation of the Security Company, were $640½ and $641, respectively. In all cases, the fair market price of such stock is the mean of the bid and asked prices on such dates. As shown in finding 6, the prices of the Bank stock on April 16, 1928, March 22, 1930, and November 23, 1932, the dates when plaintiffs' decendent made the purchases here in question, were $3,875, $5,905⅛, and $1,625, respectively.

November 29, 1933, the day of the dissolution of the Security Company and the termination of the trust and the issuance of certificates of beneficial interest in the Security Company and for the day prior and the day subsequent thereto, the quoted market prices of the Bank stock were:

November 28, 1933	$1,025 to $1,075
November 29, 1933	1,040 to 1,090
November 30, 1933	1,055 to 1,105

November 29, 1933, the market value of certificates of beneficial interest in the Security Company's assets was $16 to $17 per share, as evidenced by trading in those certificates.

16. March 13, 1935, plaintiffs' decedent filed a return of income for the calendar year 1934 and then and thereafter paid to the Collector Federal income-tax payments aggregating $26,127.89 in quarterly installments on March 13, June 10, September 6, and December 11, 1935. Subsequently on demand plaintiffs' decedent paid an additional income tax for the calendar year 1934 on May 4, 1936, in the sum of $90.56, making a total payment for 1934 of $26,218.45. In computing the net taxable income on his return for the calendar year 1934, plaintiffs' decedent did not deduct any amount in connection with the sale of the declarations of interest for thirty-five undivided parts in the distribution of the proceeds in dissolution of the Security Company.

17. February 18, 1938, plaintiffs' decedent filed a claim for refund in the sum of $13,381.75 for the calendar year 1934. The principal ground assigned in the claim for refund was that a loss had been sustained on the sale of the thirty five declarations of interest in the Security Company and that such loss should be determined on the basis of the difference between an allocated cost of the Security Company's stock and the selling price of the declarations of interest in the Security Company, such allocation being made under a method outlined in the claim. The Commissioner rejected the claim August 10, 1940.

18. During the period from the formation of the Security Company until its dissolution, a unit of the Bank stock represented inseparable and interrelated interests in the Bank and the Security Company, the interlocking character of the

two companies and the inseparable character of the interests having an effect on the value of the respective interests. The costs or investments by plaintiffs' decedent in units of the Bank stock on April 16, 1928, March 22, 1930, and November 23, 1932, were single, and it was on those dates and has been ever since those dates impracticable to apportion such costs or investments on those dates between the Bank and Security Company stocks.

The court decided that the plaintiffs were not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the Court:

On February 14, 1908, the First National Bank of the City of New York, in order to give to its stockholders the supposed benefits of investment in kinds of securities which could not be lawfully held by a bank, organized the First Security Company, a corporation authorized to invest in such securities. The story of how the Security Company was set up and how it was related to the bank is told in findings 3, 4, and 5. In brief the arrangement was that there was endorsed on the certificate of stock of each stockholder in the bank a statement that the stockholder had an interest in the dividends or profits, and, in case of dissolution, in the distribution of capital of the Security Company, ratable with his interest in the bank. He was to have no stock in, or right to vote in the Security Company, all the stock and the right to vote it being vested in trustees, who were to be the officers of the bank. The only control expressly given to the stockholders over the trustees was that an express direction in writing signed by the holders of two-thirds of the bank stock would be binding on the trustees. Only by the same kind of direction could the trust arrangement be terminated. Neither the bank stock by itself or the equitable interest in the assets of the Security Company represented by the indorsement could be separately transferred.

Plaintiffs' testator bought 15 shares of the bank stock with the Security Company indorsement in 1928, 15 shares in 1930, and five shares in 1932.

In 1933, a federal statute[1] required national banks to divorce their securities affiliates, and the Security Company was dissolved and the trust agreement terminated. Transferable declarations of interest in the proceeds of dissolution of the Security Company were issued by the trustees to the bank stockholders, and the indorsements were removed from the stockholders certificates of bank stock.

Plaintiffs' testator received his declarations of interest in the proceeds of dissolution of the Security Company on December 6, 1933, and sold them on January 29, 1934. Plaintiffs claim that he sold them for less than he paid for them, and was entitled to deduct that difference from his 1934 income as a loss incurred in a transaction entered into for profit. He filed a timely claim for a refund of $13,381.75 of his 1934 income tax which claim the Commissioner of Internal Revenue rejected.

The defendant contends that the sale by plaintiffs' testator of the declarations of interest in the dissolution of the Security Company may not be treated separately as showing a loss, since his interest in the Security Company was acquired in combination with his stock in the bank, and the answer to the question whether a loss or a profit resulted from the transaction cannot be had until the bank stock is sold, so that it may be known how much the combined investment has sold for.

In order to determine, as plaintiffs would have us do, that the interest in the Security Company was sold for less than it cost, it would be necessary to apportion a part of the price plaintiffs' testator paid for his bank stock with the Security Company indorsement on it, to the interest in the Security Company represented by the indorsement. We could then say that the interest in the Security Company cost so much. We know how much it sold for in 1934, and could determine the amount of the loss or gain.

The defendant concedes that in some instances apportionment of the amount of a single purchase price to several items purchased for that single total price may be had. It contends, however, that this is not a proper case for such an

[1] Banking Act of 1933, 48 Stat. 162.

apportionment, since it would not be practicable here. We take this argument to mean that no particular value could be assigned to the interest in the Security Company represented by the indorsement on the bank stock, as of the date of the purchase of the bank stock, with any degree of assurance that that assignment of value was correct, or even approximately so. If that is true, the apportionment should not be attempted, since the exact answer to the question of profit or loss may be obtained by waiting till the bank stock is sold.

We think it is true that an attempt here to attribute a certain value to the interests in the Security Company acquired by plaintiffs' testator involves us largely in guesswork. Plaintiffs suggest two theories according to which apportionment of values might be made. According to one, the value of the net assets held by the bank and the Security Company, respectively, on the dates of purchase by plaintiffs' testator would be computed and added and the ratio which the Security Company's net assets bore to the total net assets would be the ratio which the price paid for an interest in the Security Company corresponding to a share of bank stock bore to the total price paid for a share of bank stock with the indorsement on it. According to the other of plaintiffs' suggested methods, the fact that at the times of purchase of the stock by plaintiffs' testator, stocks of banks having security affiliates sold at ratio of price to book value entirely different from stocks of banks not having such affiliates is important and should be taken into account in determining how much of the purchase price should be attributed to the bank stock and how much to the interest in the Security Company. But taking this fact into account, plaintiffs' witness suggested values widely different from those arrived at by plaintiffs' other method. Either of these methods seems plausible to us, as a rough guess at a value that might be attributed. But we do not think that the situation calls for such a rough estimate, when by patience the exact answer may be obtained. We think, therefore, that the Commissioner acted within his powers in refusing to permit the deduction.

Other tribunals have reached the same result in comparable cases.

In *De Coppet* v. *Helvering*, 108 F. 2d 787 (C. C. A. 2) the Court held that when interests in a securities company, which interests had been when acquired locked to bank shares, as they were in our case, became worthless, a loss could not be taken by the owner for deduction from his income for income-tax purposes. The Court in that case stressed, more than we have done, the fact that the "investment was single" and that "the investor could not have dealt with the parts separately," because of the locking device. We do not feel certain that the fact that two pieces of property are locked together by a valid restraint on alienation, so that, at the time of their purchase, one cannot be sold without the other, necessarily means that if later, after the restraint has been removed, one is sold without the other, a taxable profit or a deductible loss may not follow. Of course, as in our case, the locking device increases the practical difficulty of attributing a correct value to either piece of property as of the time of purchase, since the very fact of the restraint usually affects the value of the combination and each of its components in amounts difficult to measure.

The then Board of Tax Appeals, now the Tax Court of the United States, in *Hagerman* v. *Commissioner*, 34 B. T. A. 1158, reached a conclusion opposite to ours, and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit, 102 F. (2d) 281. But the Board in the *De Coppet case*, 38 B. T. A. 1381, and the Circuit Court of Appeals for the Third Circuit in reviewing one of the cases consolidated, in the Board preceeding, with the *De Coppet case*, held as we hold, that apportionment was not practicable and no deductible loss could be taken. *Wise* v. *Commissioner*, 109 F. (2d) 614. Both the Board and the Court said that the *Hagerman case*, *supra*, was distinguishable, but we do not see any material distinction.

Plaintiffs' petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JANE W. W. BANCROFT, HERBERT M. COLE, AND KENNETH C. HOGATE, AS TRUSTEES UNDER A DECLARATION OF TRUST OF THE FINANCIAL PRESS COMPANIES OF AMERICA, DATED DECEMBER 30, 1930, AND THE FINANCIAL PRESS COMPANIES OF AMERICA v. THE UNITED STATES

[No. 45286. Decided April 5, 1943]

On the Proofs

Income and excess profits tax; method of accounting.—Under section 41 of the Revenue Act of 1936 (49 Stat. 1648, 1666), all that is required of the taxpayer is that net income be computed in accordance with the method of accounting regularly employed by the taxpayer in keeping taxpayer's books and that such method clearly reflects taxpayer's income.

Same.—The true test is what the books of the taxpayer show. *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92, cited.

The Reporter's statement of the case:

Mr. John L. Merrill, Jr., for the plaintiffs. *Mr. George W. Martin and Emmet, Marvin & Martin* were on the briefs.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. On December 30, 1930, The Financial Press Companies of America was created under the laws of the State of Massachusetts and is now existing under such laws as a Massachusetts business trust with transferable shares under a declaration of trust bearing that date. This declaration of trust is now in full force and effect, being designated as "Declaration of Trust of The Financial Press Companies of America" and executed by the plaintiff, Jane W. W. Bancroft, and by Hugh Bancroft and John Richardson, these individuals being the original Trustees thereunder.

The plaintiffs, Jane W. W. Bancroft, Herbert M. Cole, and Kenneth C. Hogate, during the years 1936 and 1937

were and ever since have been the Trustees under the above-mentioned declaration of trust and are now acting as such Trustees.

2. On March 15, 1938, The Financial Press Companies of America duly executed and filed with the Collector of Internal Revenue for the Second District of New York its United States Corporation Income and Excess Profits Tax return on Treasury Department Form 1120 for the calendar year 1937, and its United States return of Personal Holding Companies on Treasury Department Form 1120–H for the same calendar year. At the same time plaintiffs paid the total tax shown to be due on return Form 1120, namely, $16,795.31, such payment being made to the Collector of Internal Revenue for the Second District of New York.

No tax was shown to be due on the return on Form 1120–H. The amount of $16,795.31 consisted of the normal tax and surtax in the sum of $14,234.04, and the excess profits tax in the sum of $2,561.27.

On the corporation income and excess profits tax return for the year 1937, in response to question 10, which read:

> Is this return made on the basis of cash receipts and disbursements?

the answer was, "Yes."

3. Thereafter, on January 25, 1939, The Financial Press Companies of America received a letter from C. R. Krigbaum, Internal Revenue Agent in Charge, Second District of New York, and a copy of the report of the examination of plaintiffs' Income and Personal Holding Company returns for the calendar year 1937, referred to in the letter. The letter stated, among other things, that the following adjustment of plaintiff company's tax liability appeared to be warranted:

Year: 1937 Deficiency-Income Tax	$384.19
Deficiency—Sec. 351	10,647.74
Total Additional Taxes	11,031.93

The report also stated that the principal causes of the alleged additional taxes were:

> Taxpayer files on a cash basis, but in computing the taxes on the returns Forms 1120 and 1120–H, used the accruals for the current year instead of the taxes actually paid in the year 1937 as a deduction.
>
> The accruals are not a proper deduction in accordance with Section 23–c (1) of Regulations 94 and Bureau ruling.
>
> The return filed for the Year 1936 showed no taxable income, consequently no taxes were paid during 1937. * * *

4. On February 24, 1939, The Financial Press Companies of America filed with the Internal Revenue Agent in Charge, Second District of New York, a protest against the adjustment proposed in the letter of January 25, 1939, *supra*. The protest set forth that plaintiffs' contentions were that for the purpose of determining their tax liability they should be treated as being on an accrual basis, and that the accruals of taxes for the calendar year 1937 should be allowed as a deduction.

5. Pursuant to the additional assessment made by the Commissioner of Internal Revenue in accordance with the revenue agent's report referred to in Finding 3, the plaintiffs on July 17, 1939, paid to the Collector of Internal Revenue by check the sum of $11,031.93, and at the same time filed with the collector a "Waiver of Restrictions on Assessment and Collection of Deficiency in Taxes" (Form 870), the waiver reserving the right of plaintiffs to file a claim for refund.

6. September 19, 1939, the plaintiffs paid to the Collector of Internal Revenue for the Second District of New York the sum of $886.18, interest on $11,031.93, this interest consisting of $30.86 on the alleged income-tax deficiency of $384.19, and $855.32, interest on the alleged deficiency in the surtax on personal holding companies in the amount of $10,647.74.

The total amount therefore paid, and inclusive of interest, was $11,918.11.

7. The deficiency of $11,031.93 so assessed against and paid by the plaintiffs for the calendar year 1937 was due to the refusal on the part of the Commissioner of Internal Revenue to permit the plaintiffs to deduct, for the purpose

of determining their income tax liability for the calendar year 1937, the excess profits tax for the year 1937 which was actually paid by the plaintiffs during the following year, and, for the purpose of determining their liability for surtax on personal holding companies for the calendar year 1937, the income and excess profits tax for that year which was actually paid by the plaintiffs during the following year.

8. Plaintiff, The Financial Press Companies of America, by means of stock ownership controls various subsidiary companies engaged in the business of publishing news. This is accomplished by publishing four newspapers, one magazine, and news bulletins in two cities, and operating electric tickers in about sixty cities.

The income of the plaintiffs is derived from three sources, which comprise interest, dividends, and patent royalties.

9. Interest items for the year 1937 consisted of interest on an advance to Wall Street Journal Building Company of $51,890.52; interest on a mortgage of $7,354.17, and miscellaneous interest of $100, the total of such interest items being $59,344.69.

The interest items for the year 1937 in the respective amounts of $51,890.52 and $7,354.17 were carried on the books of the plaintiff company as items accrued, such amounts having been set up through monthly accruals. However, the amounts so accrued represented interest due and payable at, or prior to, the end of the year, and the amounts having been paid when due and appropriate credits having been made against the accrual items, no part of the amounts remained on the plaintiff company's books as accrued and unpaid at the end of the year. The interest accrued and paid for 1937 was the amount reported as income in its income tax return for that year. This same situation existed during the years 1934 to 1940, inclusive, both as to the treatment of the items on the company's books and the manner in which they were reported in its income tax returns.

10. Income from dividends for the year 1937 consisted of dividends from the various subsidiary companies of plaintiffs in the amount of $215,000 and miscellaneous dividends

from investments in the amount of $147.55, or a total of $215,147.55. These dividends were not declared or paid at regular intervals and were paid in the same year in which they were declared.

As each of the dividends paid by a subsidiary company depends upon the income of that individual company, which fluctuates, the dividends are not capable of being estimated in advance and are treated on the books of the plaintiff company as income as and when received.

11. The items of patent royalties for the year 1937 consisted of royalties paid by Dow, Jones & Company, Inc., for patents owned by plaintiffs on tickers manufactured and owned by the Dow, Jones Company. These royalties for the year 1937 amounted to $29,032.

These royalties were paid to the plaintiffs monthly during the year 1937 and were paid at the rate of $2 for each ticker. As the number of tickers in operation at the beginning of each month varies and cannot be estimated in advance, the royalties are treated on the books of the plaintiff company as cash income as and when received.

12. The expenses of the plaintiffs consist solely of three items, which are taxes, salaries, and office expenses. The total expense for the year 1937 amounted to $30,078.82, of which $15,625.91 represented taxes, $14,200 salaries, and $252.91 miscellaneous business expenses.

13. The total tax sum of $15,625.91 was made up of Federal income taxes in the amount of $14,618.23 for the year 1937, social security taxes in the amount of $337.68, and capital stock tax in the amount of $670.

The income taxes and social security taxes in the respective amounts of $14,618.23 and $337.68 were carried on plaintiff company's books as accrued items, such accruals having been set up monthly throughout the year in a manner similar to the interest items referred to in Finding 9. Since the income taxes and a portion of the social security taxes were not payable until after the end of the year, these unpaid amounts remained on plaintiff company's books as accrued items until paid during the following year. The capital stock item of $670 was not carried as an accrued item but was charged directly to income as and when paid.

During all the years which the plaintiff company has been in operation, all taxes, with the exception of the capital stock tax, have always been accrued on the books and such policy has been followed up to the present time.

14. The plaintiff company had two paid employees and the total amount of their salaries for the year 1937 was the previously mentioned sum of $14,200. These salaries were paid weekly, and where a year ended in the middle of a week the salaries were paid in full up to the end of the year. Plaintiffs treated the item of salaries on the books as operating expenses as and when paid.

15. The miscellaneous business expenses of the plaintiffs in the amount of $252.91 consisted of various items such as postage stamps, legal and accounting fees, printing, and typewriter repairs. These items are not capable of being estimated in advance and plaintiffs treated miscellaneous office expenses on their books as expenses as and when paid.

16. For each of the years during which the plaintiff company has been in operation its books have been consistently kept on the same basis and in the same manner as they were kept in 1937.

The plaintiffs' annual accounting period has been the calendar year, and in each of the calendar years from 1934 through 1940 plaintiffs distributed all of their earnings to their stockholders in each year. Plaintiffs' only withholding was to retain cash out of gross earnings at the end of the year to meet the accrued expense for that year for Federal income taxes which would be payable in the ensuing year.

17. On each one of plaintiffs' income tax returns up to those of 1939 and 1940 plaintiffs, in answer to the question thereon as to whether the return was made on the basis of cash receipts and disbursements, responded "Yes."

Beginning with the returns for 1939, the returns were reported as having been made on the accrual basis, although there had been no change in plaintiffs' method of bookkeeping from that employed in prior years. The returns for 1939 were accepted by the Commissioner as correct.

Plaintiffs regularly employed the accrual basis in keeping their books and filing their returns.

18. On October 24, 1939, the plaintiffs filed with the Collector their claim for refund of $11,918.11, on the same grounds as those set forth in Finding 4. Up to the date of the filing of the petition in the present case the plaintiffs received no notification from the Commissioner of Internal Revenue as to what disposition had been made of the claim for refund, and more than six months had elapsed between the dates of the filing of the claim for refund and the present petition.

19. Subsequent to the filing of the petition adjustments have been made by the Commissioner of Internal Revenue in plaintiffs' favor which reduces the amount claimed to $11,557.00.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiffs are the trustees of a personal holding company, The Financial Press Companies of America. By means of stock ownership the plaintiffs control various subsidiary companies which are engaged in the business of publishing and disseminating news. They publish four newspapers, a magazine, news bulletins in two cities, and own patents used on tickers manufactured and owned by the Dow Jones Company.

The plaintiffs started business in 1930 and at that time set up a system of bookkeeping which they have consistently followed ever since. Their income consisted of interest from loans, dividends on stock held in the subsidiary companies, and royalties from the patents on the ticker machines. Their expenses consisted of taxes, salaries, and general minor office expenses. The income from interest was accrued monthly throughout the year and was paid before the end of the calendar year. No accrual items of interest remained on the books at the end of the year. Dividends and patent royalties were variable and uncertain so these two income items were not accrued but were credited on the books as and when received. Items of salaries and office expenses were paid monthly. The largest

item of expense was for taxes and was accrued monthly on the books. It is apparent that the only two items capable of accrual were accrued on the books regularly each year and that practice has been followed consistently since the corporation was organized in 1930. Plaintiffs distributed all of the earnings to their stockholders in each year, saving only enough to pay taxes which were for that year but not payable until the following year.

In 1938 plaintiffs filed a personal holding company return and also an income and excess profits tax return for the year 1937 and paid the tax thereon. The officer signing the return, in answering the question whether the companies were on a cash receipts and disbursements basis, answered in the affirmative. As a result of this statement the Commissioner of Internal Revenue in 1939 readjusted the tax liability and assessed a deficiency income tax of $384.19 and a deficiency tax, under Section 351 of the Revenue Act of 1936 (49 Stat. 1648, 1732), as amended by the Revenue Act of 1937 (50 Stat. 813), of $10,647.74. These deficiency assessments were based on the ground that taxes accrued had been taken as deductions whereas the taxpayer had filed its return on a cash basis and therefore accrued items of deductions were not allowable. After protest plaintiffs paid the additional assessment with interest and filed a refund claim. The total amount paid was $11,918.11.

By the Revenue Act of 1934 (48 Stat. 680), a surtax was first imposed on Personal Holding Companies and it was in the nature of a penalty tax. Its purpose was to prevent wealthy individuals from forming personal holding companies and accumulating and not distributing net income (Report of Ways and Means Committee, House Report No. 1546, 75th Cong., 1st session).

Section 356 of the Revenue Act of 1937, *supra*, which amends Sec. 23 of the Revenue Act of 1936, *supra*, defines adjusted net income and provides:

(a) Additional Deductions.—There shall be allowed as deductions—

(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; * * *.

The question which arises is whether the plaintiffs kept their books on a cash or accrual basis.

All that was required of the plaintiffs was that their net income be computed in accordance with a method of accounting regularly employed in keeping their books and that such method clearly reflect their income. Section 41 of the Revenue Act of 1936, *supra*, (page 1666), requires:

> The net income shall be computed upon the basis of the taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

Deductions and credits are provided for in Section 43, Revenue Act of 1936, *supra*, (page 1666), as follows:

> The deductions and credits * * * provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

The plain meaning of these sections is that the net income for tax purposes shall be computed in accordance with a system of accounting, which the taxpayer regularly maintains and carries out, and that it reflect clearly the net income which was intended to be reached by the tax.

Plaintiffs' books were kept under the same method of accounting since its organization and the items which were accruable were monthly accrued. This method gave a picture each month of the true financial situation of the company. The taxes were monthly accrued and although they were not payable until the following year nevertheless they were the taxes for the current year. Before the end of the calendar year these taxes were dèducted from gross income and the balance was paid in dividends to the stockholders.

The main trouble in this case arose, and is now before us, because of the erroneous answer of the official in making the income tax return for 1937. However, this answer, taken at its face value, may have led the Internal Revenue Department to believe the accounting system was on a cash receipts and disbursements basis. Nevertheless the true test is what the books of the company show.

In *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92, the Supreme Court said:

> * * * But whether a return is made on the accrual basis, or on that of actual receipts and disbursements, is not determined by the label which the taxpayer chooses to place upon it.

It is worthy of observation that the plaintiffs, without any change in the method of keeping their books or filing their return for the year 1939, had the approval of the Commissioner when the answer on the return showed an accrual basis.

We are convinced that the plaintiffs have always maintained their accounting system on the accrual basis and the Commissioner was in error in making the deficiency assessment, and we are of the opinion that the plaintiffs are entitled to recover.

The defendant has made some adjustments in the amount due since the commencement of this action. After allowance of the adjustments there remains the sum of $11,557.00.

Plaintiffs are entitled to recover $11,557.00, with interest as provided by law.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM H. GOEDE v. THE UNITED STATES

[No. 45403. Decided April 5, 1943]

On the Proofs

Pay and allowances; promotion of non-commissioned officer before retirement.—Non-commissioned officer in U. S. Army is not entitled to the retired pay of a grade to which he had been promoted contrary to the policy of the War Department, which grade he did not hold at the time of his retirement. *Lomax* v. *United States*, 95 C. Cls. 524, distinguished.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff first enlisted in the United States Army on August 15, 1890. He thereafter served practically continuously as an enlisted man in the United States Army until December 25, 1915, when he was placed on the retired list in the grade of first sergeant. At the time of his retirement he was credited with 23 years 6 months and 19 days' actual military service, of which 6 years 6 months and 7 days were foreign service and counted double for retirement, making a total of 30 years and 26 days' service.

Plaintiff's service record and copies of the official correspondence relating to his retirement are contained in the reply of the War Department, plaintiff's Exhibit 1, which is made a part of this finding by reference.

2. September 9, 1915, plaintiff was appointed Chief Musician, he having been on and for some time before that date Battalion Sergeant Major. November 22, 1915, he made written application for retirement in the grade of Chief Musician which he was then holding. His application was approved by his commanding officer and forwarded on the same day to The Adjutant General, Washington, D. C. When plaintiff made this application he had not completed

30 years of service, even counting foreign service as double time for retirement purposes.

3. November 29, 1915, The Adjutant General by order of the Secretary of War advised the commanding officer of plaintiff's regiment as follows:

> 1. The records of this office show that this soldier was appointed Chief Musician from Battalion Sergeant Major, September 9, 1915. The policy of the Department regarding such appointments for the purpose of giving an enlisted man more pay on the retired list is as follows:
>
> (a) The appointment of noncommissioned officers is delegated to officers of rank and experience with the object of filling these grades of the army with eligible men who are specially qualified to perform the duties of their grade.
>
> (b) The provisions of A. R. 256 that "noncommissioned staff officers will preferably be selected from the noncommissioned officers of the regiment who are most distinguished for efficiency, gallantry, and soldierly bearing" indicates desirable accomplishments for consideration in selecting an appointee from among those who have ability to fill the position.
>
> 2. Unless there is something unusual connected with the service of Chief Musician Goede, of which the War Department is not advised, he will not be retired as a Chief Musician.

4. December 5, 1915, the commanding officer of plaintiff's regiment replied to The Adjutant General and informed him, among other things, as follows:

> This promotion seems deserved on account of the excellent record of the soldier. He has served since November 21, 1910, as Battalion Sergeant Major in the Headquarters Office of the Regiment where he has on numerous occasions, for a total of 8 months and 21 days to date, acted as Regimental Sergeant Major; and is at present so acting since August 26, last, in a most satisfactory manner. Had any vacancy occurred since 1913 he would have been promoted to it strictly on his merits and service.

By this time plaintiff had completed more than 30 years' service as computed for retirement purposes.

5. December 9, 1915, The Adjutant General by direction of the Secretary of War advised the commanding officer of plaintiff's regiment in writing as follows:

The retirement of William H. Goede, as Chief Musician, is disapproved as being contrary to the present policy of the War Department.

6. December 13, 1915, plaintiff submitted his application for retirement in the grade of First Sergeant, Company F, 4th Infantry, in which grade he was then serving. December 14, 1915, plaintiff's application for retirement in the grade of First Sergeant was forwarded with approval recommended by his immediate commanding officer and the commanding officer of his regiment.

7. December 14, 1915, the commanding officer of plaintiff's regiment wrote The Adjutant General as follows:

> 1. Your indorsement of December 9, 1915, on application for retirement of William H. Goede has been received. The present policy of the War Department in regard to the retirement of enlisted men will be strictly complied with in applications which are hereafter forwarded.
> 2. A copy of regimental order issued (G. O. No. 10) is inclosed which it is believed will forestall any and all efforts for appointment to higher grades for the purpose of retirement.
> 3. In this particular case, as the position of Battalion Sergeant Major which this soldier formerly occupied has been filled, orders have been issued reducing him to the grade of private, and then appointing him sergeant and assigning him to a company.
> 4. This soldier served, in a highly satisfactory manner, as 1st Sergeant in a company of this regiment for over eight years. In view of this, he will be appointed 1st Sergeant; and will apply for retirement as such.
> 5. It is believed that this will meet with the approval of the War Department; and will be held to be in accord with its general policy.

General Orders No. 10, dated December 13, 1915, referred to in the above communication, is as follows:

> The following policy will govern in this regiment relative to the retirement of enlisted men.
> It is in conformity to the present policy of the War Department; and in future, will be strictly observed.
> Enlisted men will be recommended for retirement in the grades in which they are serving and have served, and in which they are performing the duties, whether as noncommissioned staff officers, sergeants, cooks, corporals, or privates.

In order that an enlisted man shall be deemed eligible for retirement with a grade higher than Private he must have actually performed the duties of the higher grade in a satisfactory manner, and for a reasonable time, to demonstrate fully his capability.

The custom that has grown up of noncommissioned officers of the higher grades giving way for brief periods for the benefit of Privates or lower noncommissioned grades, and solely for the benefit of the applicant for retirement, without any demonstration of ability in the higher grade, will be discontinued.

8. December 20, 1915, by direction of the Secretary of War, Special Orders No. 295 were issued, paragraph 13 of which related to plaintiff, as follows:

> 13. First Sergt. William H. Goede, Company F, 4th Infantry, is placed on the retired list at Brownsville, Tex., and will repair to his home. * * *

Plaintiff, however, was not retired as a First Sergeant until December 25, 1915.

9. There is no evidence that plaintiff was a musician, or ever served as such in any capacity in the Army.

10. If plaintiff was entitled to be retired in the grade of Chief Musician, and is entitled to the difference between the retired pay and allowances of a First Sergeant, which he has received, and the retired pay and allowances of a Chief Musician from March 13, 1935, to May 31, 1941, the date of the latest available pay roll on file in the General Accounting Office, there would be due him for that period the sum of $2,935.81, as computed by the Comptroller General. Plaintiff's claim is a continuing one.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, on November 22, 1915, made a written application for retirement from the Army in the grade of Chief Musician, which grade he then held, having been appointed to it on the preceding September 9. When plaintiff made his application on November 22, he had not completed the thirty years of service necessary for retirement, but was one week short of it. When plaintiff's application was perused

by the War Department, the Adjutant General, by order of the Secretary of War, wrote plaintiff's commanding officer that plaintiff would not, unless there was some special circumstance, not appearing on his record, which justified it, be retired as a Chief Musician, since to do so would violate the policy of the Department, which policy was not to promote men on the eve of retirement to positions for which they were not qualified, merely to give them more pay on the retired list. There was nothing on plaintiff's record to indicate that he was a musician. On December 5, 1915, plaintiff's commanding officer wrote the Adjutant General that plaintiff's record as a soldier was excellent; that he had been Battalion Sergeant Major for some years; that he had acted as Regimental Sergeant Major on numerous occasions and would have been promoted to that rank if any vacancy had occurred in it. By the time this letter was written, plaintiff had completed the 30 years of service necessary for retirement.

On December 9, the Department advised plaintiff's commanding officer that plaintiff's retirement as Chief Musician was disapproved, as "contrary to the present policy of the War Department." Plaintiff's commanding officer thereupon reduced plaintiff to the grade of a private, then appointed him a First Sergeant and assigned him to a company. Plaintiff had served as a First Sergeant for eight years in that same regiment, earlier in his service. The position of Battalion Sergeant Major which plaintiff had had just before he had been made a Chief Musician on September 9 had been filled, or plaintiff would have been given that position. Plaintiff's appointment as First Sergeant was made by his commanding officer to give plaintiff the most advantageous pay position to retire from, which would not violate the policy of the Department.

On December 13, 1915, plaintiff made application for retirement in the grade of First Sergeant. His commanding officer transmitted the application to the Department, with a recital of the demotion and promotion of plaintiff which had occurred, and the reasons. The Department approved the retirement and plaintiff was retired on December 25, 1915. He has received the retired pay and allowances of a First

Sergeant since that date. On March 13, 1941, he filed his petition in this case, suing for the difference between what he has received and what he would have received if he had been retired in the grade of Chief Musician, which he held when he made his first application for retirement. Plaintiff seeks this difference only for the period since March 13, 1935, and for the future, since whatever claim he might have had before that time has been barred by the statute of limitations.

The Government asserts that plaintiff acquired no rights under his application of November 22, 1915, because his period of service at that time was some days short of the necessary thirty years. It is not necessary, in view of what we say hereafter, to decide that question, though we are inclined to think that, since plaintiff's premature application was still pending when he did complete the thirty years of service, and since the Department, when it later disapproved the retirement on this application, did not raise any question as to its prematurity, the Government's point is not well taken.

Plaintiff was, however, reduced to a private and then promoted to a first sergeant before he was actually retired. These actions were taken, not for the purpose of arbitrarily reducing plaintiff's retirement pay, as this court thought the demotions in the *Lomax case*, 95 C. Cls. 524, and the other cases there cited were, but for the preservation of a sound policy of the Department against promoting soldiers, on the eve of retirement, to higher paying positions for which they had no qualifications, merely to increase their retirement pay.

In these circumstances, we think plaintiff is not entitled to the retired pay of a grade to which he had been promoted contrary to the policy of the department, which grade he did not hold at the time of his retirement.

Plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CARL H. HILTON v. THE UNITED STATES

[No. 45350. Decided April 5, 1943]

On the Proofs

Pay and allowances; inclusion of Academy Service; Naval Reserve officer not in the Naval Service within provisions of Act of June 10, 1922.—An officer in the Coast Guard who on June 30, 1922, was an officer in the United States Naval Reserve Force, created by the Act of August 29, 1916 (39 Stat. 556, 587), was not an officer of the U. S. Navy "in the service on June 30, 1922," within the provisions of the Act of June 10, 1922 (42 Stat. 625, 627), and accordingly is not entitled to include his service in the Naval Academy in computing his longevity pay.

Same.—Under the Act of August 29, 1916 (39 Stat. 556) creating the Naval Reserve Force, one who enrolled in the Naval Reserve Force was not in the Naval Service but by his enrollment had done no more than obligate himself to serve when called upon, in war or in a national emergency declared by the President.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Messrs. Ansell, Ansell & Marshall* were on the brief.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. E. Leo Backus* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a lieutenant commander in the Coast Guard. He was paid as such for the month of February 1941, first appointment above ensign, fourth pay period, with over 18 and less than 21 years of service. The computation of such pay made no allowance for his service as a midshipman, United States Naval Academy, hereinafter described, nor had such allowance been made in the computation of plaintiff's pay for any month or period prior thereto.

2. Plaintiff was graduated from the United States Naval Academy on June 2, 1916, after serving as a midshipman therein for three years ten months and twenty-seven days from the time of his appointment on July 6, 1912.

3. After his graduation from the Naval Academy, plaintiff served in the Navy and Coast Guard as follows:

a. Active service in the Navy for four years one month and twenty-nine days, from June 3, 1916, when he was commissioned ensign, until August 2, 1920, when he resigned, after having been temporarily appointed lieutenant, junior grade, on July 1, 1917, and temporarily appointed lieutenant on February 1, 1918.

b. Reserve status in the Navy from August 9, 1920, when he was appointed lieutenant, United States Naval Reserve Force, until the expiration of the four-year term of enrollment on August 8, 1924, when he was honorably discharged.

During this period plaintiff was on inactive duty except for the following periods, when he was on temporary active duty other than training:

October 1 to October 15, 1923.

March 15 to April 1, 1924.

May 1 to May 15, 1924.

c. Renewed reserve status in the Navy from November 13, 1924, when he was reappointed lieutenant, United States Naval Reserve Force, inactive duty, until June 30, 1925, when his Naval Reserve service was terminated by reason of his retention of a commission in the Coast Guard, hereinafter described.

During this period of reserve status no active duty was performed by plaintiff.

d. Active service in the Coast Guard, from the date of his temporary appointment as ensign on August 20, 1924 to the present, including temporary appointment as lieutenant on October 2, 1925, appointment as lieutenant on March 5, 1927, and appointment as lieutenant commander on August 20, 1932.

4. Plaintiff's claim for the inclusion of his service as a midshipman in the United States Naval Academy in the computation of his longevity pay has been submitted to the Comptroller General of the United States and disallowed by him on the ground that an officer of the Naval Reserve Force in an inactive duty status on June 30, 1922, is not an officer in the service on that date within the meaning of section 1 of the Act of June 10, 1922 (42 Stat. 625).

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff is a lieutenant commander in the Coast Guard. His first appointment in the Coast Guard was on August 20, 1924, when he was appointed an ensign. Prior thereto, however, he had been an officer in the Navy, having graduated from the United States Naval Academy on June 2, 1916. He resigned from the Navy on August 2, 1920, but on August 9, 1920, he enrolled as a lieutenant in the United States Naval Reserve Force, which commission he held on June 30, 1922.

In computing his length of service he seeks to include his service in the Naval Academy, which he alleges he is entitled to do under the Act of June 10, 1922 (42 Stat. 625, 627). Section 1 of that Act provides in part:

> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment * * *. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay. * * *

On the date of the passage of that Act officers were entitled to include their service in the Naval Academy in computing longevity pay (Act of March 3, 1883, 22 Stat. 473).

The first question, therefore, is whether or not the plaintiff was an officer "in the service on June 30, 1922." At that time, as stated, he held a commission in the Naval Reserve Force. Whether or not such an officer was "in the service" depends upon the proper interpretation of the Act of August 29, 1916 (39 Stat. 556, 587), which created the Naval Reserve Force. That Act says the Naval Reserve Force shall be composed of those who "obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President * * *." It provides for "retainer" pay for members thereof enrolled in a provisional rank or rating of $12.00 per annum, and the Act expressly provides that "Enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Regular Navy only during such time as

they may by law be required in the Navy, in accordance with their obligations, and when on active service at their own request as herein provided * * *." When called into active service they were entitled to the same pay, allowances, gratuities, and other emoluments as other officers and enlisted men on active duty of the same rank and length of service; but when not on active duty they were not entitled to any pay, bounty, gratuity, or pension, except the retainer pay previously referred to.

It seems to us from from a reading of these provisions that one who had enrolled in the Naval Reserve Force was not in the Naval service, but by his enrollment had done no more than to "obligate [himself] to serve" when called upon. Retainer pay is not pay for service, but only in consideration of the promise to serve when called upon.

Both the definition of members of the Naval Reserve Force as those who "obligate themselves to serve" and the provision for retainer pay clearly indicate to us that by enrolling a person did not become a member of the service but merely promised to become a member when called upon.

If in the service, a member of the Naval Reserve Force of course would be subject to the laws, regulations, and orders for the government of the Navy, but the Act expressly says that members of the Naval Reserve Force shall not be subject to the laws, regulations, and orders for the government of the Navy, except during such time as they are called into active service.

Unless in the service on June 30, 1922, plaintiff is not entitled to include his midshipman service in computing his length of service.

This construction of the Act of August 29, 1916, *supra*, does no violence to the purpose sought to be accomplished by the Act of June 10, 1922, *supra*. The Act was primarily intended to prevent the inclusion in the computation of service for pay purposes all service which was not commissioned service. At the time of its passage, however, there were a number of officers who were permitted under the law to include their midshipman service in computing their length of service. Congress did not desire to reduce their pay and, hence, it added the provision that officers in the service when

the Act was passed or, rather, on June 30, 1922, were permitted to include all service which they formerly had been entitled to include in computing their length of service. This meant midshipman service and enlisted service.

Plaintiff at the time of the passage of this Act was not drawing any pay from the Navy at all other than this inconsequential retainer fee and, therefore, Congress could not have had in mind such a person in enacting the provision designed to prevent the reduction in pay of any officer then in the service.

The House Committee in charge of the Bill (Act of June 10, 1922, *supra*) said that this clause and other similar ones had been "included in the bill to recognize the moral obligation of the Government not to reduce the pay of any officer now in the service below the rate established in 1908 * * *."

Plaintiff certainly was not counting on his Naval pay for his livelihood, and Congress could not have had him in mind. The Act creating the Naval Reserve Force expressly permitted a member thereof to accept employment in any branch of the public service and to be paid for such service, something prohibited to a member of the military establishment on active duty. To his employment outside of the service plaintiff looked for his livelihood, not to his pay from the Naval establishment. Compare *Leonard* v. *United States*, 64 C. Cls. 385, 279 U. S. 40, 44.

Nearly two years before June 30, 1922 plaintiff had resigned from the Naval service. On that date he was not in the service, but only had obligated himself to serve in war, or in a national emergency declared by the President.

We are of the opinion that plaintiff is not entitled to recover. His petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

WALTER S. SMITH v. THE UNITED STATES

[No. 45415. Decided April 5, 1943]

On the Proofs

Pay and allowances; bachelor officer in Naval Reserve on active duty; dependent mother.—It is *held* that plaintiff, bachelor officer in the Naval Reserve, on active duty, is entitled to recover increased rental and subsistence allowances of an officer of his rank and length of service, where it is not disputed that he was his mother's chief support.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was appointed a lieutenant in the United States Naval Reserve on February 14, 1936. He was commissioned a lieutenant commander on September 11, 1940, to rank from December 11, 1939, which rank he now holds. He reported for active duty on July 17, 1939, and remained continuously on active duty during the period covered by this claim.

The plaintiff was a bachelor officer until November 4, 1940, when he was married.

2. Plaintiff's father, James L. Smith, Sr., is 83 years of age. He engaged in the practice of law until about January 30, 1932, when he retired from active work on account of his advanced age. Since that time he has held no employment whatsoever.

Plaintiff's mother, Mrs. James L. Smith, is 68 years of age. She is in fairly good health, but is unable to obtain or to hold any gainful employment on account of her advanced age.

3. The only real property owned by plaintiff's parents since July 16, 1939 was an equity in a house at 1617 Highland Avenue, Knoxville, Tennessee. The house was mortgaged and the mortgage was foreclosed in August or September 1939. Plaintiff's parents realized nothing for their equity in the house when the mortgage was foreclosed.

They own no income-producing personal property except about $300 which the mother has on deposit in the "Postal Savings."

4. Plaintiff's parents lived together at 1617 Highland Avenue, Knoxville, Tennessee, until September 1, 1939. Since that date they have lived at 1634 Highland Avenue, Knoxville, Tennessee. During the period from July 16, 1939 to November 4, 1940, they rented a portion of their home to a widow and her minor child, who paid $32 a month for their rooms, which price included board for the child. Plaintiff's mother incurred an expense of about $23 a month in connection with the rental of the rooms, which expense included the cost of the board supplied to the child, additional fuel to heat the second floor of the house (which the roomers occupied), laundry, and wear and tear on linens, etc.

5. During the period from July 16, 1939 to November 4, 1940, the average monthly household expenses of plaintiff's parents amounted to approximately $86.75 to $91.75, and consisted of the following items: Rent, $35; food, $40 to $45; heat, $8; electricity and gas, $2.50; and water, $1.25. The mother, in addition to her share of the household living expenses, spent about $7 a month for clothes, $5 for medical expenses, and about $2.50 a month for incidental expenses.

6. Plaintiff's mother has two sons besides the plaintiff. The eldest son, Olin, is 37 years of age, and unmarried. During the period from July 16, 1939 to November 4, 1940, he was employed by The Aluminum Company of America, at Alcoa, Tennessee, at a weekly salary of about $19. His earnings were sufficient for his own support, but he contributed nothing towards the support of his parents. The youngest son, James, is 33 years of age, and unmarried. During the period from July 16, 1939 to November 4, 1940, he was unemployed until about October 1, 1939, when he obtained work as an advertising contact man and salesman for the Ballantine Ale Company. He was unsuccessful as a salesman and actually lost about $200 during the time he held such employment. He made occasional small gifts of money to his mother, amounting in all to from $35 to $50 during the period here involved.

7. During the period from July 16, 1939 to November 4, 1940, the plaintiff regularly sent his parents $40 to $50 a month. Such contributions were made by check, and he also sent additional contributions at irregular intervals amounting to about $200 during the period of his claim.

The mother's only income, other than plaintiff's contributions, was the $9 a month profit which she realized from the rental of a part of the house, and the $35 to $50 given to her by her son James.

8. Plaintiff is entitled to the increased rental and subsistence allowances of an officer of his rank and length of service, with a dependent mother, during the period from July 16, 1939 to November 4, 1940, in the sum of $1,010.93, as computed by the General Accounting Office.

The court decided that the plaintiff was entitled to recover, in an opinion per curiam, as follows:

Plaintiff was clearly his mother's chief support. The defendant does not deny it.

Judgment will be entered against the defendant and in favor of plaintiff for $1,010.93. It is so ordered.

WALTER A. ROGERS, CHARLES V. BURGHART AND LESTER C. ROGERS, TRUSTEES FOR THE STOCKHOLDERS OF B. & R. COMPANY, INC. v. THE UNITED STATES

[No. 44581. Decided April 5, 1943]

On the Proofs

Government contract; construction of dam; delay in relocation of railroad tracks; responsibility of Government for delay.—Contractor entitled to recover the excess costs of construction directly resulting from delay of 85 days in the removal of railroad tracks by another contractor, where it was provided in the specifications that the contractor would not be permitted to construct a certain portion of a dam until an existing railroad line, passing through the dam site, was relocated under the contract with said other contractor, and where such delay was due to the acts of the defendant.

Reporter's Statement of the Case

Same; liquidated damages; United States v. *Rice and Burton, Receivers, distinguished.*—The Government may not escape responsibility by merely waiving the right to collect liquidated damages, regardless of additional costs to the contractor by delay caused by the Government. *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61, distinguished.

Same; right-of-way.—Where in a contract for construction of a Government dam it was provided in the specifications that the Government would not be responsible for any delay in furnishing the grounds or right-of-way; it is *held* there can be no recovery for such delay.

Same; decision of department head; jurisdiction.—The provisions of the contract in suit made the finding of the head of the department final as to the facts of delay and extension of time but did not make such authority final as to the interpretation of the contract.

The Reporter's statement of the case:

Messrs. George R. Shields and *John M. Martin* for the plaintiff. *Messrs. King & King* and *John W. Gaskins* were on the briefs.

Mr. Frederick Schwertner was on the brief for Wm. Eisenberg & Sons, Inc., as *amicus curiae.*

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. Rawlings Ragland* and *Henry A. Julicher* were on the briefs.

The original opinion in this case was delivered October 5, 1942, holding that the plaintiff was entitled to recover.

Defendant's motion for new trial was overruled April 5, 1943; and on the court's own motion the findings of fact, conclusion of law, and opinion filed on October 5, 1942, were vacated and withdrawn, and new findings of fact and conclusion of law, with an opinion by Judge Jones, were filed as set forth hereinafter below.

SPECIAL FINDINGS OF FACT

1. Bates & Rogers Construction Co., an Illinois corporation, was the contractor in this case. Under a reorganization its name was changed to B. & R. Company, Inc., which subsequently liquidated its assets and distributed them to its stockholders. Among its assets was the claim involved in this suit. Plaintiffs are the trustees for the stockholders of

the B. & R. Company, Inc., under a trust indenture dated December 20, 1938.

2. In compliance with defendant's invitation for bids, Bates & Rogers Construction Co. (hereinafter referred to as the "contractor") submitted its bid for the construction of Dover Dam, located near Dover, Ohio, on the Tuscarawas River. It being the successful bidder, a contract dated May 13, 1935, was executed by defendant through Major J. D. Arthur, Jr., Corps of Engineers, District Engineer at Zanesville, Ohio, as contracting officer, and by the contractor through C. V. Burghart, its Vice President and Treasurer. The contract was approved May 31, 1935, by Lieut. Col. R. G. Powell, Division Engineer, Ohio River Division, Cincinnati, Ohio.

3. Under this contract and the specifications and drawings forming a part thereof the contractor, for an estimated consideration of $957,262, agreed to furnish all labor and materials, and perform all work required for the construction of Dover Dam, except that certain materials designated in paragraph 1-15 of the specifications were to be furnished by the Government. The contract was on a unit-price basis except as to the following items: (1) Diversion and care of river during construction, for which a price of $45,000 was fixed; (2) removal of existing structures, $400, and (3) clearing reservoir areas, $32,000. The contract and specifications are of record as Plaintiff's Exhibit 1 and are by reference made a part hereof.

The contract provided that work was to be commenced within 10 calendar days after receipt of notice to proceed and to be completed within 700 calendar days after receipt of such notice. The contract was received by the contractor June 5, 1935, accompanied by notice to proceed, which fixed May 5, 1937, as the completion date.

4. In accordance with the usual practice in cases such as this, the contractor submitted to defendant a progress chart which showed that it intended to start concrete operations during the second month of the contract period and that after 5½ months (the end of the first working season) it would have completed 33 percent of all the concrete operations called for by the contract; that no concrete was to be poured

during the winter from the end of the 5½ months' period to the 10th month, but that excavating work was to be carried on continually for practically the entire contract period; that when work was resumed in the spring of 1936, the river would have been diverted and the second cofferdam built, and 95 percent of all concrete poured (not including the entrance houses) by the end of 17½ months. This anticipated progress would have left only 5 percent of all the concrete to be poured after the second winter layoff, and this 5 percent, under the progress chart, was to be completed by May (the 22nd month), 1937.

A duly authorized representative of the contracting officer notified the contractor November 5, 1935, that its progress chart was obsolete and requested that he be furnished with a revised chart showing the contractor's proposed operations during the remainder of the contract period. January 22, 1936, the contractor submitted another progress chart showing that it still expected to complete 95 percent of all concrete operations by the end of the 1936 working season, and 5 percent in 1937. This revised chart showed the actual progress up to the time when work was shut down during the winter of 1935–1936, and anticipated progress thereafter. The progress chart submitted with the contractor's bid and the revised chart are of record as Defendant's Exhibit D–1, pages 156 and 166, respectively, and are by reference made a part hereof.

5. At the time the invitation for bids was issued and the contract executed the Tuscarawas Branch of the Pennsylvania Railroad passed through the dam site on the left or south bank, 20 or 30 feet above the river, which was approximately 300 feet wide at the contract site, with sharp upsloping banks on both sides. The dam was approximately 920 feet long and was divided into 23 sections known as monoliths, each of which was about 40 feet long and 75 feet wide at the bottom, narrowing toward the top, some of which forming the abutments extended into the high banks of the river.

The specifications contemplated that the north half of the dam, including monoliths 1 to 11, to the center of the stream, would be erected within the first cofferdam during the 1935

season, and that the south half, including the remaining monoliths, would be erected within the second cofferdam after the removal of the first, during the 1936 working season. The contractor planned its operations and laid out its plant and equipment to the end that the work be performed within this period of time. The specifications provided as follows:

> 1–04 (h). * * * The contractor will be permitted to construct any or all of dam monoliths 17 to 21, inclusive, [on the south or railroad side of the river] at his convenience, provided that his operations do not interfere with the traffic over the existing line of the Pennsylvania Railroad and he will be permitted to construct dam monolith No. 16 as soon as the existing railroad line is abandoned. It is estimated that this line will be abandoned by or prior to March 1, 1936. The contractor will not be allowed to construct the second cofferdam and the remaining dam monoliths Nos. 12 to 15, inclusive, until the existing railroad line is abandoned or until authorized in writing by the contracting officer and subsequent to completion of work in the first cofferdam as previously specified. The request for such authorization shall be submitted in writing to the contracting officer at least two weeks in advance of the desired date of starting work on the second main cofferdam.
>
> 1–04 (f). In case the relocation of the Pennsylvania Railroad is not completed and the rails and ties of the existing line are not removed by March 1, 1936, the contracting officer will extend the required date of completion, by a period of time equal to that lost by the contractor due to the delay after March 1, 1936, in completing the relocation of this railroad and the removal of the rails and ties of the existing time.

The railroad was to be relocated at approximately 70 feet above the river, or at the elevation of the top of the dam. The work of relocating the railroad, which involved the grading for and the removal and relocation of about 12 miles of track, was covered by a contract between the United States and Geo. W. Condon Co., dated March 29, 1935.

The Condon Company had expected to complete relocation of the railway prior to February 1, 1936. However, six change orders were issued, two of which were major changes, as a result of which time extensions totaling 243 days were allowed. One of these change orders involved the construction of an underpass consisting of a steel deck plate girder

bridge, with concrete abutments and wing walls, with pile foundations and water-proofed concrete deck. There were to be metal casings for concrete pile foundations. For this particular change order the Condon Company was allowed additional compensation in the sum of $37,679.40, and a time extension of 90 days. During the winter months of 1936 the Condon Company was permitted to suspend work for a period of 75 days because of unfavorable weather.

6. June 6, 1935, the contractor in this case arrived on the job and began the work of clearing the site of timber, etc., drawing up plans for the construction plant and preparing to bring on its equipment. Excavation was begun on the north bank July 1 and construction of the north cofferdam July 5. The cofferdam was unwatered August 2. During August 1935 a flood overtopped the cofferdam causing suspension of work until it could be unwatered. September 9, 1935, Change Order No. 1 was issued, which extended the contract period 13 days on account of this flood. The first concrete was placed October 8. In October 1935 the contractor found on assembling and erecting its steel trestles for large derricks for handling, excavation, and placing concrete, that they were not of sufficient strength to stand the load to which the derricks subjected them, and they had to be sent to Chicago to be redesigned. In the meantime cranes were used and the excavated material transferred by runways and trucks, which slowed down the progress of the work and added to the cost of pouring concrete.

The August flood and the required adjustments in the plant operated to delay concrete pouring in 1935, but by working until December 24, 1935, instead of until December 1, as originally planned, there remained to be poured only about 10,000 cubic yards of concrete, the plant capacity for about one month, on the north half of the dam to bring the work to schedule as originally planned. In March 1936, when the contractor expected to resume pouring concrete, it had no aggregate on hand and was unable because of winter conditions to secure delivery thereof until April. However, prior to that time the defendant had notified the contractor that the railway tracks would not be relocated until about

May 15, so this delay was immaterial. Pouring of concrete was resumed on April 18, 1936.

During the spring of 1936 floods again overtopped the cofferdam, causing suspension of work, and on account of this condition Change Order No. 17, issued February 21, 1938, extended the contract period 8 days. In July 1936 the contracting officer gave the contractor authority to divert the river through the north half of the dam and remove the first cofferdam. The river was diverted in August 1936. The discovery of a rock fault at certain monoliths in the second cofferdam resulted in the issuance of Change Order No. 18 of March 19, 1937, which increased the contract price by $31,995.08 and extended the contract period 30 days.

7. The railroad was not relocated until October 8, 1936. Monoliths 22 and 23 over which the relocated railroad was to extend were built during 1935, and excavation was carried down to the line of the old railroad track, but deeper excavation below such line between the railroad and monolith 22 could not be done in 1935 without endangering the existing railroad. Change Order No. 23 extended the contract time 85 days from July 15 to October 8, 1936, on account of the delay in relocating the railroad.

The contract price was increased $4,860.80 and the contract time extended 30 days by Change Order No. 26 of November 4, 1937, on account of additional excavating and grading necessary at the south abutment of the dam, and Change Order No. 17, dated February 21, 1938, extended the contract period 45 days on account of flood conditions during the second winter season. Because of floods, rock faults, and extra work there were delays for which extensions of time were allowed the contractor. The contracting officer found that a delay of 85 days from July 15 to October 18, 1936, was attributable to failure of defendant to remove the railroad. All work on the dam was completed November 29, 1937, and accepted by the Government December 4, 1937.

8. While the testimony is somewhat conflicting as to whether the pouring of all concrete could have been completed during 1936 if the railway tracks had been relocated by March 1, 1936, or within a reasonable time thereafter, it

shows that most if not all major concrete operations could have been completed during that season, leaving only the topping off and dressing up work, and at most only a small amount of concrete pouring to be done in the spring of 1937.

9. Except for the delay of defendant in relocating the railroad which crossed the site of the dam, the contractor would have completed the construction of the dam at least 85 days earlier than it was otherwise able to do.

10. The underpass, which was the occasion of an extension of 90 days in the Condon contract, was not needed immediately, nor was it expected to be needed at an early date. Up to October 1939 the underpass had never been used. It could have been constructed after the removal of the railroad. In view of the long additional delay and the large additional expense to which plaintiffs would be put by the construction at this time, the defendant's conduct wholly disregarded plaintiffs' rights and was unreasonable. It was the cause of a delay of 85 days to plaintiffs, which delay was entirely the fault of the defendant.

11. February 2, 1937, the contractor made written application to the contracting officer for increased costs and extension of time because of the delay of the Government in relocating the Pennsylvania Railroad tracks. April 10, 1937, the contracting officer denied the claim on the ground (1) that defendant did not guarantee the completion of the railroad relocation by March 1, 1936, and (2) that the failure to relocate the railway did not delay the contractor anything like the nearly 10 months that it claimed.

May 1, 1937, the contractor appealed from that decision to the Chief of Engineers, War Department, Washington, D. C., through the Contracting Officer. The Chief of Engineers was the authorized representative of the head of the department under Articles 15 and 28 of the contract. The Chief of Engineers denied the appeal and affirmed the decision of the contracting officer on February 10, 1938.

12. Plaintiff's claim for increased costs due to defendant's delay in relocating the railroad tracks (including extra costs in 1936 due to same cause) is as follows:

Reporter's Statement of the Case

1. General supervision	$5,219.99
2. Job supervision	26,628.41
3. Bond	No increase
4. Miscellaneous office & travel expense	4,971.01
5. Taxes	3,198.73
6. Small tools and repairs	10,602.41
7. Cost of transporting equipment not used	1,029.90
8. Roads and sidings	No claim
9. Fuel, lubricants and power	5,189.58
10. Plant rental	37,534.96
11. River control	12,871.87
12. Common excavation	5,216.35
13. Rock excavation	3,760.92
14. Rock trench excavation	No claim
15. Concrete	35,715.31
Total	151,939.44

This claim is based on the ground that had the contractor been delayed only until July 15, 1936, it would have been able to complete all major concrete operations and remove the second cofferdam during 1936, and that the period from January 1 to September 8, 1937, and the above-mentioned costs represent the actual excess time and excess costs on the job due to the delay after July 15, for which delay it is claimed the defendant is financially responsible.

Plaintiff's original itemized claim was considerably in excess of the items set out in the first part of this finding. The items so set out are the net result after defendant's auditor had eliminated errors and duplications. The question of the responsibility for the excess costs was not passed upon by the auditor. A large part of many of the items is not clearly shown to be the result of the 85 days' delay. After eliminating these amounts and parts of amounts which are doubtful the actual necessary increased cost attributable to the 85 days' delay is $41,686.24.

13. Item 3 of the contract provided that the contractor would be paid $32,000 for clearing the reservoir areas. The specifications of the contract involved herein provided that the right-of-way which was to be furnished by the Muskingum Watershed Conservancy District "would probably not be available prior to August 1935", and that the Government would not be responsible for any delay in furnishing

the grounds or right-of-way, but in case of such delays the contracting officer would grant an extension of time for the completion of the work. The letter of award, dated May 15, 1935, and which was written subsequent to the preparation of the contract and specifications, advised the contractor that the titles to the necessary land for construction purposes had been secured. As a matter of fact, not all of the land essential for the completion of the dam had been acquired at that time and the contractor was given notice to proceed with the work long before their acquisition was completed.

There were repeated delays in securing the rights-of-way and easements for reservoir purposes. They were secured piecemeal. A considerable portion was secured late in the contract period while a part was never acquired, and the contract was changed accordingly.

The contractor planned and was prepared to clear an area up to pool level of Dover Dam promptly after beginning operations in June 1935. The contractor frequently protested the failure of the Government to deliver the lands for clearing in a manner that would permit the orderly prosecution of such work. The land as given for such clearing was in widely separated parcels, and the manner in which it had to be done on this account was more expensive than it otherwise would have been.

Change Order No. 8 of October 1, 1936, restricted the clearing of certain areas to the removal of dead or fallen trees, logs, and underbrush, for which the contract price was decreased $315. The contracting officer advised the contractor on August 28, 1937, in part as follows:

> The records of this office show that when you ceased clearing operations in March 1937, there still remained to be cleared under the terms of the contract and Change Order No. 8 approximately forty (40) acres plus 46 acres on Conotton Creek between Elevations 877 and 880 which you were directed not to clear. As there has been delay in furnishing rights-of-way for this acreage, you will be required to do no more clearing under the contract, and you may disregard the Resident Engineer's letter of July 16 on the subject.
>
> An equitable adjustment of the contract price because of the elimination of this eighty-six acres will be made when your claim for increased costs due to delays is

considered by the Chief of Engineers. To assist in arriving at such an adjustment, it is requested that I be furnished at the earliest practicable date, an itemized statement of all costs incurred by you under Item 3 of your contract, as shown by the certified records of your office.

Pending a settlement of your claim, you will be allowed on your next estimate the total sum of $23,810 under Item 3 $\left[\frac{250}{336}\times 32{,}000\right]$.

14. September 3, 1937, the contractor made written application to the contracting officer for costs of $20,675.85 in addition to the contract price on account of clearing the reservoir areas. December 16, 1937, the contracting officer in a letter to the Chief of Engineers recommended that the claim be disallowed.

The Chief of Engineers affirmed the decision of the contracting officer on April 20, 1938, and advised the contractor as follows:

> Your claim is considered under two headings: (1) that, due to delay on the part of the Government in furnishing the right-of-way, you have incurred increased costs for which you seek reimbursement; (2) that the contract plans for clearing have been changed and that you are entitled to an equitable adjustment in price for such change.
>
> Paragraph 4-01 of the specifications is not a guarantee on the part of the Government that the rights-of-way for reservoir clearing will all be available by August 1935. It contains a negative statement predicting that these rights-of-way will not be available before August 1935. The other paragraphs of the specifications quoted at the beginning of this letter [1-21 and 1-04 (e)] clearly state that the Government will not be responsible for any delay in furnishing the right-of-way and further indicate that there is a distinct possibility that such delay might occur and provide a remedy to be applied in this event. This remedy is the granting of an extension of time for the completion of the work equal to that lost by the contractor due to the delay in securing the right-of-way. Since this contract will probably be completed without the assessment of liquidated damages, the granting of an extension of time is not here in question. The payment to you for any excess costs incurred due to delay in securing right-of-way is not proper under the terms of the contract.

> With respect to item No. 2 above, I find that you bid a lump sum price for work on an area known to contain 336 acres; that this acreage was reduced to 250 acres; that in the performance of the contract as a whole you incurred overhead expense and expected to realize a profit and should have distributed those items proportionately to each item of the contract. I find that, since the acreage to be cleared was reduced by action of the Government, you are entitled not only to the proportionate part of the lump sum price based upon the acreage actually cleared, but also undistributed overhead and profit on the remaining acreage not cleared. The figures for these items are taken from the contracting officer's analysis of the cost figures submitted by you. The amount allowed you in compensation for the work performed under item No. 3 of your contract should therefore be $26,018.74, computed as shown on the supporting sheet attached. The District Engineer is being advised to issue a change order in accordance with this finding.

Plaintiffs now claim $16,054.44 in excess of the contract price for clearing the reservoir site.

By reason of the delay in acquiring rights-of-way and easements the actual cost to the contractor of the clearing operations was at least $10,696.53 in excess of what it would have been but for such delay. The amended contract price would have been sufficient to cover the cost of all clearing operations had the rights-of-way and easements been secured in a timely manner.

The court decided that the plaintiffs were entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The plaintiffs as trustees for the stockholders of B. & R. Company, Inc., successors to Bates & Rogers Construction Company, instituted this suit to recover excess costs caused by delay in furnishing rights-of-way and easements for the construction of a dam on the Tuscarawas River near Dover, Ohio. The delay is alleged to have been the fault of the defendant.

Bates & Rogers Construction Company, hereinafter referred to as the contractor, agreed for an estimated consideration of $957,262 to furnish all labor and materials and perform all work required for the construction of the Dover

Dam, except that certain materials designated in paragraph 1-15 of the specifications were to be furnished by the Government.

The contract was to be commenced within 10 calendar days after receipt of notice to proceed, and to be completed within 700 calendar days thereafter. Notice to proceed was given June 5, 1935, thus fixing May 5, 1937, as the date for completion.

A progress chart was furnished by the contractor, indicating the intention of completing one-third of the concrete operations during the working season of 1935, the balance up to 95 percent to be completed during the working season of 1936, leaving only 5 percent to be poured after the second winter layoff, together with topping off and dressing up of the work.

At the time the contract was executed a branch of the Pennsylvania Railroad passed through the dam site on the left or south bank of the river, from 11 to 21 feet above the normal level of the river. The river was about 300 feet wide at this point, with sharp up-sloping banks on both sides.

The specifications contemplated that the north half of the dam, including monoliths 1 to 11 to the center of the stream, would be constructed first, after which the river would be diverted and the south half of the dam, including the remaining monoliths, would be constructed. The specifications provided that the south half of the dam might be constructed at the contractor's convenience, provided its operations did not interfere with traffic over the existing line of the Pennsylvania Railroad and that it would be permitted to construct monolith No. 16 as soon as the existing railroad line should be abandoned. The specifications stated "it is estimated that this line will be abandoned by or prior to March 1, 1936. The contractor will not be allowed to construct the second cofferdam and the remaining dam monoliths Nos. 12 to 15 inclusive, until the existing railroad line is abandoned, or until authorized in writing by the contracting engineer and subsequent to completion of work in the first cofferdam as previously specified." They also stated that in case the relocation of the Pennsylvania Railroad was not completed by March 1, 1936, the contracting officer would extend the time

for completion of plaintiff's contract. The railroad was to be relocated at approximately 70 feet above the river or at the elevation of the top of the dam.

The major part of the work of relocating the railroad, which required the removal and relocation of about 12 miles of track, was covered by a contract between the United States and the Geo. W. Condon Company dated March 29, 1935, though there were other contractors involved. On June 6, 1935, the contractor in the instant case arrived on the job and began the work of clearing the site of timber, drawing up plans for the construction plant and preparing to bring on its equipment. Excavation was begun July 1, and construction of the north cofferdam July 5. The cofferdam was unwatered August 2. There was a short delay on account of a flood overtopping the cofferdam. It was necessary to redesign the steel trestles in order to make them stronger. In the meantime cranes were used. This for a short time slowed down the progress of the work. In an effort to keep up with its progress schedule the contractor continued to pour concrete until December 24, 1935, although it had anticipated discontinuing not later than December 1. This brought it within 10,000 cubic feet of its schedule, about one month's plant capacity. In March 1936 when the contractor expected to resume pouring concrete it had no aggregate on hand, and because of winter conditions was unable to secure delivery thereof until April. However, prior to that time the defendant had notified the contractor that the railway would not be relocated until about May 15, so this delay was immaterial. Pouring of concrete was resumed on April 18, 1936.

During the spring of 1936 floods caused a suspension of the work, for which an extension of time of 8 days was granted. In July 1936 the contracting officer gave the contractor authority to divert the river through the north half of the dam and remove the first cofferdam. The river was diverted in August 1936. Rock faults were discovered which caused a further extension of time and an increase in the contract price. There were repeated delays in relocating the railroad. The engineer in charge notified the contractor that it would probably not be completely done until May 15,

1936, the completion date for removal was deferred from time to time and the railroad was not finally relocated until October 8, 1936, more than 7 months after the time estimated in the specifications and more than 9 months after the time called for in the contract with the Geo. W. Condon Co. This greatly handicapped the contractor in the instant case, made it necessary to slow down its work, and increased its costs of operation.

The crux of plaintiffs' complaint is that the contractor had undertaken a two-season contract and that because of the failure of defendant to have the railroad tracks removed by March 1, 1936, or within a reasonable time thereafter, the time within which the construction of the dam could have been completed was greatly extended and the cost thereof greatly increased, and that this being the fault of the defendant, they are entitled to recover the increased costs thus necessarily incurred, which they allege to be approximately $210,000.

The defendant answers with the plea that necessary delays and change orders made it impossible for the work to be substantially finished in the year 1936 and that it was not responsible for the delays in relocating the tracks of the Pennsylvania Railroad.

It is rather clear from the evidence that had the railroad been relocated within a reasonable time after March 1, 1936, and had there been no delays and change orders, the contractor could have completed the contract practically in accordance with its original schedule. It is also clear, however, that because of floods, rock faults, and extra work and change orders which were the fault of neither party, it probably could not have finished before June 15, and possibly not before July 15, 1937. Taking all these matters into consideration, it is very evident that on account of the delays directly flowing from the failure to relocate the railroad tracks, the contractor was delayed at least 85 days. This delay of 85 days was conceded by the defendant's engineer and the contracting officer.

There is much dispute as well as conflicting evidence as to the responsibility for other delays, and in view of the state of the record the plaintiffs should be confined on this

phase of the case to the damages which directly resulted from the 85 days' delay.

Plaintiffs' claim for damages was rejected by the contracting officer and on appeal was rejected by the Chief of Engineers who was the authorized representative of the head of the department.

The Chief of Engineers, while conceding that the failure to remove the railroad tracks caused a delay of 85 days, nevertheless rejected the claim on the ground that according to his interpretation of the provisions of the contract the defendant owed no obligation in respect to any excess costs that might be caused by any delay in the relocation of the railroad tracks.

Article 9 of the contract made the finding of the head of the department final as to the facts of delay and extension of time, but did not make such authority final as to the interpretation of the contract.

By the terms of the specifications it was estimated that the railroad line would be relocated by or prior to March 1, 1936. It was on this basis that the contractor figured its bid, made its plans, provided its equipment, organized its work and prepared its progress schedule. The specifications further provided that in the event the relocation of the Pennsylvania Railroad was not completed by March 1, 1936, the contracting officer would extend the required date of completion by a period of time equal to that lost by the contractor due to the delay after March 1, 1936.

In carrying out the contract for relocation of the railroad with the Geo. W. Condon Co. the defendant made 6 change orders, two of them major changes. The aggregate delay caused by these change orders with the Condon Company was 243 days.

The first of these change orders provided for the building of an underpass upon a recently authorized state highway. This was to consist of a steel deck plate girder bridge, with concrete abutments and wing walls, with pile foundations and water-proofed concrete deck. By virtue of this one change order the contract period for the relocation of the railroad tracks was extended 90 days. Upon the request of the Condon Company the engineer ordered a suspension of

the work of relocation during the winter months. Finally on October 5, 1936, the authorization for removal of the tracks was turned over to the Pennsylvania Railroad Company itself, and it fininhed the removal of the tracks on October 8.

While according to the instant contract defendant was not specifically required to have the tracks removed by March 1, 1936, and while the contract with the Condon Company provided for change orders, we do not think that the defendant was authorized to completely disregard its obligation to the contractor, to consult its own convenience only, and to delay indefinitely the removal of the tracks without any regard for the rights of the contractor and without any consideration for the tremendous extra expense that would thus be placed upon it.[1]

The contracting officer suggested that the contractor could have avoided some of the delays by moving across the tracks and doing the necessary excavating beyond them before the tracks were removed. A glance at the photographs of record in this case shows how impracticable such a procedure would have been. The slope was steep just beyond the tracks. The tracks were very close to the normal level of the river. It would have necessitated excavating in holes and with great danger of slides over the tracks. Deep holes would have been left on both sides of the tracks while traffic was still operating. In the event of floods it would have caused incalculable damage. So great was the danger of such a procedure that the contracting officer required that if the contractor chose to do this work before the tracks were removed, it agree in writing to be responsible for any damages that might thereby be caused. Such a state of facts takes most of the strength out of the plea of the defendant that the contractor could have proceeded with its work. The extra cost as well as possibility of great damage left the contractor no choice but to adjust its work in such a way as to await the relocation of the tracks.

While the defendant had a right to make changes under

[1] *Carroll Electric Co. v. United States*, 68 C. Cls. 500, 506; *Detroit Steel Products Co. v. United States*, 62 C. Cls. 686, 697, 698; *Worthington Pump & Machinery Co. v. United States*, 66 C. Cls. 230, 240.

the terms of the contract with the Condon Company, we do not believe it was justified in giving to the contractor notice to proceed and then doing such affirmative acts as suspending the work of the Condon Company through the winter months and ordering major changes which would entail great delays without any consideration for the increased burdens thus placed upon the contractor. Each of the parties to a contract has some obligation to respect the rights of the other party.[2] If the defendant had contemplated the major changes in the Condon contract, it should either have notified the contractor of those proposed changes or have delayed the notice to proceed.

The underpass which was the occasion of an extension of 90 days in the Condon contract and concededly was the cause of an 85 days' delay in the instant contract could have been constructed after the removal of the tracks. The evidence shows that up to the time of the taking of testimony in this case, some two years after the completion of the contract, the underpass had never been used. No highway has ever been built at this point. The railroad could have been relocated according to the original plan and the underpass built later when and if a new road was definitely determined upon. The defendant should have known the damage which would be caused to plaintiffs by the delay occasioned by the construction of the underpass at that time. It wholly disregarded plaintiffs' rights and its obligations to plaintiffs. This conduct was the cause of a delay of 85 days to plaintiffs, which delay was entirely the fault of the defendant.

There were other wrongful acts of defendant, heretofore referred to, which delayed the removal of the railway tracks, causing damages and excess costs, and for which defendant was responsible. However, since these acts ran concurrently, we think the damages should be confined to the period of 85 days. All in all, the record indicates a rather arbitrary disregard of the rights of the contractor and a disposition to lend it little assistance in carrying out the obligations of its contract.

[2] *United States* v. *Speed*, 8 Wall. 77, 84; *United States* v. *United Engineering and Contracting Co.*, 234 U. S. 236.

It is contended that the recent decision of the Supreme Court in the *Rice* [3] case is controlling, and should prevent recovery by the plaintiffs. We do not think so. In that case the delay was caused by unforeseen conditions which were not the fault of anyone, and a method for making adjustments, in the event unforeseen conditions should develop, was specified in the contract. That remedy has been invoked. We do not construe the *Rice* case as holding that affirmative wrongful action or failure of the defendant to discharge its obligations under the contract could be cured by simply waiving liquidated damages. The liquidated damages clause is placed in the contract for the protection of the defendant. If it were held that the simple waiver of such a penalty clause were all the relief that could be secured by plaintiffs, regardless of the added expense of labor, bonds, interest, rental of machinery and other costs, and regardless of how long a delay might be occasioned by the defendant, then the plaintiffs would have no protection from wrongful acts or from negligent failure of the defendant to perform its obligations under the contract. We do not think the officials of the defendant should be permitted to "kick the contractor all over the lot" and escape responsibility by merely waiving the right to collect liquidated damages, regardless of what the additional costs to him might be. If such a construction were made, it would certainly cost the defendant heavily in the form of higher bids in all future contracts. Neither the language of the opinion nor the issue involved in the *Rice* case justifies any such construction.

We find that defendant was wholly at fault in causing a delay of at least 85 days in the removal of the railroad tracks, and that plaintiffs are entitled to recover the excess costs of construction directly resulting from such delay.

In the state of the record it is difficult to measure the exact damages that were thus caused. Some of the items of plaintiffs' claim are not clearly allocated. As to others, the proof is somewhat doubtful. After eliminating all uncertain and doubtful items, we find that the evidence clearly shows that

[3] *United States* v. *Rice and Burton, Receivers*, decided November 9, 1942, 317 U. S. 61.

the plaintiffs' damages by reason of the 85 days' delay and directly connected therewith are at least $41,686.24.

As to the other phase of the contract, plaintiffs claim $16,054.44 on account of the delay of the defendant in securing rights-of-way and easements for clearing the reservoir area. These were to be furnished by the Muskingum Watershed Conservancy District. There were numerous delays in securing the necessary land and rights-of-way for this area. It was done piecemeal. Some of it was secured very late in the operation of the contract, and a small part was never obtained. This delay caused the accumulation of logs and debris, and the necessity for doing the work little by little made it much more expensive and thus added to the cost of the contractor's operations. The items of extra cost that were definitely proved as a result of this delay totalled $10,696.53.

However, the specifications provided that the rights-of-way were to be furnished by the Muskingum Water Conservancy District and included the statement that the right-of-way for the clearing of the reservoir area would probably not be available prior to August 1935, and they contained the further provision that the Government would not be responsible for any delay in furnishing the grounds or right-of-way.

While it is true that the letter of award dated May 15, 1935, addressed to the contractor and signed by the engineer in charge and advising the contractor that the titles to the necessary land for construction purposes had been secured, which letter was written after the preparation of the specifications, was probably calculated to lull the contractor into the belief that all the necessary lands and rights-of-way had been secured, a careful reading of the letter discloses that it is limited to the necessary land for construction purposes. While in a sense all of such land might be considered necessary since the accumulation of logs would interfere with the construction work, this is more or less incidental and in view of the very clear wording of the specifications advising that there would probably be considerable delay in securing this part of the ground for right-of-way, we think that plaintiffs are precluded from recovery for the additional cost due to the

delays in securing the grounds and right-of-way for the reservoir area. We reach this conclusion reluctantly, since it is manifest from the record that this phase of the matter was handled with little regard for the contractor's problems. Apparently little effort was made on the part of the contracting officer or engineer in charge to hasten the securing of these lands. At any rate, their handling of the matter was very careless and indifferent. But in view of the plain wording of the specifications which were a part of the contract, we can find no legal way of permitting the plaintiffs to recover these losses.

It is a pleasure to read the record in connection with an important contract in which the contractor was thoroughly efficient, had adequate facilities and performed every part of its contract in a workmanlike manner. With the single exception of furnishing too light trestles, which caused a brief slow down, but which fault was promptly corrected, the contractor was not responsible for any of the delays. In an effort to make up for delays for which it was in no way responsible, it poured concrete out of season, worked around the clock, went to extra expense, and throughout the performance of the long contract its work was not only above criticism, but both its attitude and its work were highly commendable. The fact that in 1937 after the railroad tracks were relocated and the contractor could proceed unhampered it poured as much as 15,000 cubic yards of concrete in one month adds strength to the claim that, but for the delay in the removal of the tracks, it would have been substantially a two-season contract. It was compelled to slow down its work and incur excess costs because of irritating delays that might well have been avoided.

After reading the entire record, we are impressed with the fact that the contractor was damaged in a much greater sum than we are permitted to allow, and that while some of these damages were due to unforeseeable conditions, a considerable part of them was due to the action and lack of action of defendant's officials in charge. We have limited the amount to items that were shown to be the fault of the defendant in failing to comply with its obligations to the contractor and further limited it to the period of the

85 days' delay and to the items that are definitely connected therewith. Plaintiffs are entitled to recover the sum of $41,686.24.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JAMES McHUGH SONS, INC., v. THE UNITED STATES

[No. 43154. Decided May 3, 1943]

On the Proofs

Government contract; decision by contracting officer and head of department; failure to appeal; jurisdiction.—Where a construction contract entered into by the War Department with the plaintiff called for decisions on disputes by the Quartermaster General, as the contracting officer, no appeal to the head of the department, as provided under the contract, was possible when the Quartermaster General made no decision on the claims in suit but referred them to the Comptroller General, and plaintiff's failure to appeal is no bar to the prosecution of its suit in the Court of Claims.

Same; written order for extra work or material.—There can be no recovery for extra work or material where the contract provided that no charge for extra work or material would be allowed without written order from the contracting officer and no such order was given for the extra work done.

Same; written receipt equivalent to order for extra.—Under an agreement to pay for material, whether used or not, contractor is entitled to recover for material ordered by direction of Government agent but not used where the Government receipted for the material and retained it.

Same.—The Government's receipt in writing is a sufficient compliance with the requirement of the contract that extras be ordered in writing.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, an Illinois corporation with its principal office in Chicago, entered into a written contract with defendant on December 1, 1933, by which plaintiff, for the consideration stated, agreed to construct 18 four-family apartments at Fort Sill, Oklahoma, in accordance with the contract and specifications. Work under the contract was to begin on December 10, 1933, and was to have been completed on September 25, 1934.

2. Plaintiff's claim consists of five items and grows out of a dispute between the parties as to the proper interpretation of the contract, specifications, and drawings, of which the following are pertinent to all items of the claim:

Article 3 of the contract provides that the contracting officer may make changes in the drawings or specifications and that if an increase or decrease in the amount due under the contract is caused by such changes, an equitable adjustment shall be made and the contract modified, but that no change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative.

Article 5 of the contract states that no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer, and the price stated in the order.

Article 15 of the contract provides that all disputes, except labor disputes, concerning questions arising under the contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned.

The entire contract is appended to plaintiff's petition as exhibit No. 1.

The specifications, on page 3, paragraph 7, provide that the work is entirely under the control of the Constructing Quartermaster, and on page 3, paragraph 10, state that he shall be the interpreter of the true intent and meaning of the drawings and specifications.

Page 5, paragraph 19, of the specifications provides as follows:

Drawings and Specifications Cooperative.—The drawings and specifications shall be considered as cooperative and work and material called for by one and not mentioned in the other shall be done or furnished in as faithful and thorough a manner as though fully covered by both.

Page 5, paragraph 21, of the specifications provides as follows:

Discrepancies.—Where no figures or memoranda are given, the drawings shall be accurately followed according to scale. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the C. Q. M., without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk; and in the settlement of any complications arising from such adjustment the Contractor shall bear all extra expense involved. In case of difference between drawings and specifications, the specifications shall govern.

Page 5, paragraph 22, of the specifications provides as follows:

Details.—Additional scale and full size details will be furnished where required or in the opinion of The Q. M. G., necessary. Detail drawings shall govern in all cases not made fully clear by the specifications.

Page 6, paragraph 27, of the specifications provides that no charge for extra work or material will be allowed, unless the same has been ordered in writing by the Constructing Quartermaster, and the price stated in the order.

CLAIM FOR ADDITIONAL BACKFILLING, $795.24

3. The specifications pertinent to this claim are found on pages 8 and 9, and provide as follows:

EXCAVATING, FILLING, AND GRADING

1. *Scope of Work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all excavating, grading, and backfilling required to permit the construction of the building and utilities shown on the drawings or specified and the grading around same in strict conformity with these specifications and the accompanying drawings.

The contract shall be based on earth excavation.

3. *Excavating.*— * * *

Excavations for footings of every description shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown, they shall be carried down to such levels as may be necessary and approved by the C. Q. M.

* * * * *

Authorized increase or decrease in amount of earth or rock excavation shall be paid by or credited to the United States as per amount mentioned under "Unit Prices" of bid.

* * * * *

4. *Backfilling.*—When directed by the C. Q. M., all trenches and excavated portions against walls, etc., unless otherwise specified, shall be filled with earth in 1′ horizontal layers, well puddled, tamped, and brought up to the required grades.

* * * * *

5. *Grading.*—Excavated material shall be spread around the building as required by the C. Q. M. Rock shall be deposited as and where directed by the C. Q. M.

Any excess of excavated material not needed for backfilling or grading shall be placed where directed by the C. Q. M. Spreading of top soil and finished grading is not required under this contract. The ground within the building shall be graded as indicated on drawings.

The b'd form and plaintiff's bid, Item VIII under the heading of "Unit Prices," are as follows:

Unit Prices.—The Contractor shall submit on the Standard Form of Bid, "Unit Prices" for each item which shall be used as a basis in making deductions from or additions to the contract price, provided any deviation from the drawings and specifications decreases or increases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted:

(a) Earth Excavation One Dollar ($1.00) per cu. yd.

The schedule of unit prices in the bid form did not call for a unit price for clearing the site, for backfilling, or for grading, although these are separate operations, as described

in the specifications. In making its lump sum bid plaintiff figured a sum for excavation. The sum so figured covered both excavation and backfilling.

4. When the work under the contract began, Major Doten was the Constructing Quartermaster at Fort Sill, and had working under him a number of inspectors and engineers, including Chief Engineer Edmunds, who had authority to make decisions, subject to the approval of his superior. The Constructing Quartermaster instructed plaintiff to lower the footings when suitable foundations were not found at the depth shown on the drawings. This work required additional excavation, concrete, and backfilling. While the work was in progress Edmunds, who was in charge of the inspection, issued general instructions to plaintiff's superintendent to move all the surplus earth excavated, which was not needed for backfilling, to a point approximately 200 feet from the building sites. In performing the excavation, plaintiff's superintendent in some instances left sufficient earth for backfilling beside the trench from which it was excavated, but in other instances he did not. This omission, due to an error in judgment, necessitated the removal of such earth back to the footings from the point to which it had been previously moved, about 200 feet from the buildings.

The Constructing Quartermaster had instructed plaintiff to submit its claim for the additional work of backfilling, and of all other additional work upon its completion. On July 7, 1934, after this work and other additional work had been performed, plaintiff submitted its claim therefor to the new Constructing Quartermaster, Captain George. The claim for extra excavating, concrete, and backfilling, which was in the amount of $9,225.58, included $795.24 for 795.24 cubic yards of backfilling which was made necessary by the additional excavation and the additional concrete.

The Constructing Quartermaster prepared a proposed change order based upon plaintiff's claim of July 7, 1934. However, on October 22, 1934 the Constructing Quartermaster wrote plaintiff that its claim for backfilling had been rejected by the Quartermaster General on the ground that the unit price for excavation included the excavation proper

and the disposition of the excavated material either as backfill or as surplus material in accordance with the specifications. All items claimed by plaintiff were approved except this claim for backfilling and the other claims which are the basis of this suit. A change order was issued covering all the items approved. Payment was made in accordance therewith.

It cost plaintiff $795.24 to perform the additional backfilling which consisted of two operations, namely, the removal of the earth from a point about 200 yards from the building where it had been first deposited, and then depositing such earth and other earth against the basement walls in accordance with the specifications. The proof does not show how much it cost plaintiff to remove the earth and how much it cost it to deposit it against the basement walls and tamp it down as required.

5. Paragraph 3 of the letter from the Quartermaster General to the Constructing Quartermaster, quoted in the letter of the Constructing Quartermaster to the plaintiff dated October 22, 1934, reads:

> Regarding such items included in your draft of the proposed change order as have been disallowed by this office, the contractor is at liberty, if he so desires, to file a claim therefor after the completion of the contract.

Upon receipt of this letter from the Constructing Quartermaster disallowing some of its claims, the plaintiff wrote the Constructing Quartermaster on October 25, 1934, asking reconsideration thereof and concluding as follows:

> We do not desire to present a claim against the Government after the completion of our contract, and we feel that after the facts [we] have recited are realized by the Office of the Quartermaster General, that our request for a change order to cover the above items will be approved. We have faith in your fairness and judgment.
>
> As we expect to complete and turn over to the Constructing Quartermaster the last of the 18 Four Family Apartments by October 31, 1934, we request immediate action on the reconsideration of these items, in order that when our contract is completed, they [sic] will be no delay in our final payment.

No further action was taken thereon until after the completion of the work and until after the plaintiff had renewed its claims on February 9, 1935.

On February 16, 1935 the Quartermaster General acknowledged receipt of plaintiff's claims and stated:

> This office will prepare a proper administrative report and will submit the same to The Comptroller General with the claims. If you have any additional documentary evidence and desire to furnish the same to this office, such evidence will receive proper consideration in the preparation of the report.
>
> As this office is without authority to render any decisions on the claims and can only present the facts for consideration by The Comptroller General, it is considered advisable that your firm submit all of the facts in writing rather than verbally. However, if you still consider it essential to personally review the various items of work covered by your claims with those responsible for the preparation of the administrative report referred to above, this office will be pleased to grant you an interview at your convenience. It is requested, however, that you advise this office several days in advance of your appearance in Washington.

A hearing was granted plaintiff, and subsequently it appeared before a committee appointed by the Quartermaster General to consider its claims. This committee made a report to the Quartermaster General recommending rejection of the claims, which was approved by the Quartermaster General, but the plaintiff was never advised of the action of the committee nor of the Quartermaster General's action until after this suit was brought.

On April 17, 1935 the plaintiff wrote the Quartermaster General as follows:

> With reference to five claims submitted by our company now pending in your office under the above contract we received your letter of February 16 advising that you contemplate forwarding these claims to the Comptroller General's office for settlement, and a member of our firm since receipt of this letter has visited your office and had a hearing in reference thereto, and [we] have never been definitely advised as to what your decision has been upon the merits of these claims.

> At the time of final settlement they were excepted in the release as matters that had not finally been disposed of; it being our understanding at the time of final settlement that your office would thereafter take these claims up and render decision so that if we were not satisfied with your decision we could then take the necessary appeal.
>
> However, it now appears from your letter of February 16 and conferences that our representative has had in your office that you will not advise us of your decision but on the contrary that you will forward the claim to the General Accounting Office for their decision. We have no objection if you desire to forward the claims to the General Accounting Office, but unless you advise us of your decision prior to the forwarding of the same to the General Accounting Office we would have nothing from which to take our appeal, and, therefore, request that prior to forwarding the matter to the General Accounting Office that you render a decision on the matter and advise us so that if not satisfied we may take an appeal therefrom.

The Quartermaster General replied under date of April 20, 1935, acknowledging receipt of the letter of April 17, 1935, and stated:

> You are apparently not aware of the procedure to be followed in forwarding claims to the General Accounting Office, which is under the jurisdiction of The Comptroller General of the United States, for final settlement. The function of this office and of other Governmental Departments in forwarding claims to the General Accounting Office is to assemble all pertinent data and make a definite determination of fact. Any recommendation this office may make in transmitting these claims is confidential and the law prohibits the divulging of the nature thereof.
>
> After your claim has been passed upon by the General Accounting Office it will advise you what disposition has been made thereof and will definitely outline the reasons for allowing or disallowing the various items of your claims. If you are of the opinion that the findings of the General Accounting Office are based upon an erroneous statement of fact or additional evidence has arisen which might cause it to reverse its decision, you are at liberty to present your case to that office for reconsideration.

The plaintiff was never advised of the decision of the Quartermaster General.

CLAIM FOR ADDITIONAL COST OF CONSTRUCTING FIREPLACES, $393

6. The contract required plaintiff to construct fireplaces in the buildings, and contract drawing No. 625–4461 shows the brick arch over the fireplace to be composed of single bricks of varying lengths.

Page 16, paragraph 44, of the specifications provides that "Face brick for fireplaces shall be selected from common red brick." Page 17, paragraph 46, of the specifications states: "Fireplace shall be constructed as shown on drawings with linings and back hearth built of brick laid in mortar. Fireplace hearth shall be constructed of selected common brick as shown."

After plaintiff had constructed two fireplaces with a one-brick arch composed of the common red brick, as called for by the contract, Edmunds advised plaintiff that the contract drawing required the arches to be constructed of a specially manufactured moulded brick and that it would be necessary to tear down and rebuild the two fireplaces already constructed. The special brick referred to was substantially more expensive than the common red brick provided for in the specifications, and instead of purchasing such special brick, plaintiff, at Edmunds' suggestion, submitted a blueprint proposing construction of the fireplaces with arches of common red brick, but of a brick and a half in height. After some alterations in the blueprint it was approved in writing by the Constructing Quartermaster and plaintiff proceeded to construct the fireplaces in accordance with the change at an additional cost of at least $393 in excess of what the one-brick arches of common red brick would have cost.

On July 3, 1934 and in its letter of July 7, 1934, after the work had been completed, plaintiff submitted a written claim to the Constructing Quartermaster for the additional cost of the brick arches. October 22, 1934 the Constructing Quartermaster wrote plaintiff that the claim had been rejected by the Quartermaster General on the ground that the change had been initiated by the contractor and was not ordered

by the Constructing Quartermaster, who agreed that the change undoubtedly entailed some additional expense to plaintiff.

At the hearing before the Quartermaster General's committee plaintiff's president unsuccessfully attempted to demonstrate that a workmanlike job could be accomplished through the construction of a one-brick arch composed of common red brick. Thereupon plaintiff's president admitted that he had not studied this item, and stated that the committee had better forget the claim.

The contract, specifications, and drawings did not require that the fireplace arches be constructed of the specially manufactured moulded brick which defendant insisted upon, or by the method substituted by plaintiff upon defendant's refusal to accept the type of construction authorized by the contract.

CLAIM FOR ADDITIONAL WORK AND MATERIAL IN PLACING MORTAR BETWEEN TILES, $4,298.13

7. Page 16, paragraph 44, of the specifications, under the head of "Material," provides:

> *Tile Wall* shall conform to U. S. Army Specifications No. 80-49—Class "M—Medium," interlocking type, horizontal cells with deeply scored surfaces, except where tile is exposed to view, when the surface shall be smooth.

In the addenda to the specifications it is provided in Item VIII, page 2, paragraph 4, that the words "interlocking type" shall be deleted.

Page 17, paragraph 47, of the specifications provides:

> *Laying Tile.*—Tile shall be built plumb to lines, laid in full beds of mortar and with vertical joints breaking to the middle of courses below. Tile shall be properly bonded at corners and anchored into masonry when it comes in contact with same. Fill all the joints and crevices between the tile and other work with mortar well slushed in. At all joints and exterior angles build jamb tile which shall bond with tile in walls and partitions.

The contract drawing shows a typical wall section with a 12-inch tile wall. The dimensions of the tile to be used were

not stated either in the specifications or on the drawings, and were not otherwise indicated, except by the dimensions of the wall in which the tile was to be laid. Under the terms of the contract all material purchased was subject to inspection and approval by the Constructing Quartermaster. Before the tile for the walls was purchased, plaintiff's superintendent, in company with a tile salesman, presented samples of 8-inch and 4-inch interlocking type tile to Edmunds for his approval. Edmunds granted plaintiff permission to purchase this type of tile, but advised plaintiff's superintendent at the time that if 8-inch and 4-inch tile were used, it would be necessary for plaintiff to fill in the joints between such interlocking tile to make it the same as solid 12-inch tile which, Edmunds stated, was required by the contract.

Plaintiff began laying the interlocking 8-inch and 4-inch tile and had completed the wall on the first story of one of the buildings without filling in the vertical joints between the tile with mortar so that an open space of approximately one-half inch in width was left between these joints. Edmunds required plaintiff to tear down this wall and to construct the entire wall thereafter by flushing in the vertical joints between the interlocking tile with mortar. At the time plaintiff's superintendent protested that this was not the proper or approved method of laying tile, but proceeded to construct the tile walls as directed.

After the tile walls had been completed on 11 of the buildings, Major Doten and Edmunds were succeeded by Captain George as Constructing Quartermaster and by O'Hagan as chief engineer. Captain George changed the practice enforced by his predecessor by a bulletin dated May 11, 1934, stating that:

> All tile work for exterior wall of the various buildings shall have the bed joint filled entirely full of mortar, the end joints shall be made by buttering and shoring end to end to adjoining tile. The vertical joints between the 4″ and 8″ tile shall be buttered at the two ends and placed against the tile in the wall as shown below.

The bulletin contained a sketch showing the tile buttered at the ends with mortar instead of having the crevices between the tile fully flushed with mortar, as required by Major

Doten. The remainder of the buildings were completed as prescribed in the bulletin.

The method required by Major Doten was slower and more expensive in that the mortar had to be forced in with a trowel after the tile was laid, whereas under the bulletin issued by Captain George it was possible for the workmen to butter the joints with mortar before the tile was placed in the wall. Plaintiff could have purchased the 12-inch tile at the same cost as the interlocking smaller tile, but gained some advantage in using the interlocking tile because the specifications required jamb tile to be used in the joints and exterior angles of the wall, and the cost of framing about such openings is reduced by the use of smaller tile. A difference of opinion exists among architects, builders, and tile manufacturers as to which of the two methods is the better construction practice. Some contend that leaving an open space between tile increases its insulating qualities and prevents moisture seepage by capillary attraction from the exterior to the interior. Others hold that flushing in the joints solidly between the tile does not impair its insulating qualities, and makes it more effective against dampness.

The additional cost to plaintiff of laying the tile in the manner required by Major Doten, in excess of what it would have cost plaintiff to perform the work under the method permitted by Captain George, was the sum of $4,298.13.

By letter of May 19, 1934, eight days after Captain George issued his bulletin on the subject, and again on July 7, 1934, plaintiff made a written claim to him for the additional cost of the tile walls, but the claim was not allowed.

CLAIM FOR LOUVERS, $40.52

8. By written memorandum dated January 19, 1934, one of defendant's inspectors requested plaintiff to submit a bid for the construction of certain vaults requiring louvers and some thimbles. At the same time Edmunds and another representative of the defendant instructed plaintiff to purchase the louvers and thimbles immediately since they would be needed for the first part of this work, and advised plaintiff

that if the proposal was not accepted, the defendant would pay for the material.

January 22, 1934, the Constructing Quartermaster advised plaintiff in writing that the proposal had been rejected and that the vaults would not be installed. Thereupon Edmunds instructed plaintiff to deliver the louvers and thimbles to the Constructing Quartermaster and obtain a receipt for the same. Plaintiff delivered the material, which was of the reasonable value of $40.52, to the defendant, who issued its receipt for it and kept it. Plaintiff's claim for this item was rejected on the ground that the purchase of the louvers and thimbles was not ordered by the Constructing Quartermaster.

CLAIM FOR EXCESS COST OF GRINDING AND RUBBING CONCRETE SURFACES, $3,774.15

9. Page 14, paragraph 35 of the specifications provides:

> *Finishes of Concrete.*—Concrete, unless otherwise specified, shall be finished as follows:
> (1) *Smooth Finish* will be required for all exposed surfaces of concrete on exterior of building. Concrete shall be rubbed with carborundum bricks to a uniform smooth finish.
> (2) *Rough Finish.*—All exposed surfaces of concrete or interior of building not otherwise specified, shall have all fins removed and rough edges dressed off.

On page 1, paragraph 35, Item V of the addenda, this specification was changed as follows:

> *Finishes of Concrete.*—Page 14, subparagraph (1) *Smooth Finish:* between the words: "exterior" and "of", add the words: "and interior." Delete subparagraph (2) *Rough Finish* in its entirety.

Plaintiff was required by Edmunds to use a carborundum stone and cement wash to bring the interior surface of the basement walls to a uniform smooth finish. In order to reduce the concrete rubbing to a minimum, plaintiff used matched, creosoted boards in erecting the forms for the concrete. However, in some cases the forms for the concrete walls bulged so that corresponding bulges appeared on the interior surface of the basements. These bulges were visible to the eye, and Edmunds required the contractor to grind

them down and finish the spots with cement wash. At Edmunds' direction, a straight edge was used at that time for determining when the bulges had been rubbed down to the degree of smoothness required. Although the testimony is conflicting, it is not shown by a preponderance of the evidence that concrete rubbing in excess of that provided in the specifications, as amended, was required. After Major Doten and Edmunds had been replaced by Captain George and O'Hagan, the concrete rubbing was reduced to a minimum. Plaintiff was required only to have all the fins removed from the walls and to dress off all rough edges.

Plaintiff completed the concrete rubbing on 15 buildings in the manner required by Constructing Quartermaster Doten at a cost of $4,201.67, including the cost of labor, supervision, material, supplies, and the rental of machines. This amounted to an average cost of $280.11 per building. Plaintiff completed concrete rubbing on three buildings in the manner required by Captain George at an average cost of $28.50 per building, which amount is composed of labor costs only. Plaintiff's claim is for the difference between the cost of the two methods, which was computed at the sum of $251.61 per building, with the total for 15 buildings amounting to $3,774.15.

Plaintiff presented its written claim for the excess cost of concrete rubbing to the Constructing Quartermaster on July 25, 1934. This was disallowed by the Quartermaster General in the letter quoted in the letter of the Constructing Quartermaster to the plaintiff dated October 22, 1934. It was again presented in plaintiff's letters of October 25, 1934, February 8, 1935, and February 9, 1935. Plaintiff's original estimate for the cost of concrete rubbing and this claim were both based upon the requirement in the original specifications as it appeared before it was changed in the addenda to the specifications. In its letter to the Constructing Quartermaster dated October 25, 1934, plaintiff in reference to this item of the claim wrote in part:

> Item "Q."—The reference to the subparagraph on page 14 and the use of the word "exterior" are typographical errors. The paragraph referred to and under which this extra is based is subparagraph 2 of paragraph 35, the interior of the buildings.

Again in a letter to the Quartermaster General dated February 9, 1935, plaintiff stated that this claim was made under subparagraph 2 of paragraph 35, page 14 of the specifications.

10. After the work under the contract had been completed, plaintiff executed a written release to the Government, but specifically excepted therefrom the claims involved in this suit.

Except for the Constructing Quartermaster's written approval of the change in the fireplace arches, none of the items of work included in plaintiff's claims in this suit were ordered in writing by the Constructing Quartermaster, or by the contracting officer, except the louvers. Plaintiff did not make any written protest against doing any of such additional work nor make claim for the cost thereof until after it had been performed, for the reason that the Constructing Quartermaster instructed it to present claims after the completion of the work instead of issuing a change order before the work was done.

The court decided that the plaintiff was entitled to recover only its claim for the amount expended for louvers, $40.50.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 1, 1933, plaintiff entered into a contract with the defendant for the construction of 18 four-family apartments at Fort Sill, Oklahoma. It sues to recover on five items of work it was required to do which it alleges were not called for by the contract. Its first claim is for additional backfilling in the amount of $795.24; the second, for additional cost of constructing fireplaces $393.00; third, for the cost of placing mortar between tiles, $4,298.13; fourth, for the cost of louvers, $40.52; and fifth, for the cost of grinding and rubbing concrete surfaces, $3,774.15.

To all of these claims the defendant first interposes the defense that the decision of the contracting officer on these items was adverse to plaintiff and that plaintiff took no appeal to the head of the department.

Instead of issuing change orders covering the various items of work not called for by the original contract before the work was done, the Constructing Quartermaster directed

plaintiff to do the work first and to submit a claim for it upon its completion. Accordingly, plaintiff on July 7, 1934 submitted a claim for 18 items of extra work. The Constructing Quartermaster prepared a proposed change order covering these various items and forwarded it to the Quartermaster General for approval. Most of the items were approved, and a change order apparently was issued covering them. The items on which this suit is based were disapproved and, hence, no change order was issued with respect to them.

No appeal was taken from this action of the Quartermaster General, who was the contracting officer. However, paragraph 3 of the letter from the Quartermaster General to the Constructing Quartermaster, quoted in the letter of the Constructing Quartermaster to the plaintiff dated October 22, 1934, reads as follows:

> Regarding such items included in your draft of the proposed change order as have been disallowed by this office, the contractor is at liberty, if he so desires, to file a claim therefor after the completion of the contract.

Upon receipt of this letter plaintiff wrote the Constructing Quartermaster on October 25, 1934, requesting reconsideration of the items disapproved, its letter concluding:

> We do not desire to present a claim against the Government after the completion of our contract, and we feel that after the facts [we] have recited are realized by the Office of the Quartermaster General, that our request for a change order to cover the above items will be approved. We have faith in your fairness and judgment.
>
> As we expect to complete and turn over to the Constructing Quartermaster the last of the 18 four-family apartments by October 31, 1934, we request immediate action on the reconsideration of these items, in order that when our contract is completed, they [sic] will be no delay in our final payment.

No answer was made to this letter; the matter lay dormant until after the completion of the entire work. The action taken as outlined in the Constructing Quartermaster's letter of October 22, 1934, therefore, was not final and no appeal was necessary at the time.

After the work had been completed the plaintiff executed a release excepting therefrom the claims in suit. Thereafter it wrote the Quartermaster General a series of letters with reference to them. In reply thereto the Quartermaster General wrote the plaintiff on February 16, 1935, stating that he would prepare an administrative report to be submitted to the Comptroller General with the claims, and that plaintiff might file any additional documentary evidence it desired. The Quartermaster General, however, said:

> As this office is without authority to render any decisions on the claims and can only present the facts for consideration by The Comptroller General, it is considered advisable that your firm submit all of the facts in writing rather than verbally, * * *

but it was stated that an interview would be granted if desired. The interview was granted and plaintiff presented additional evidence and argument to a committee appointed by the Quartermaster General to consider the claims. The plaintiff, however, was never advised of the decision of the Quartermaster General, although it requested advice thereon under date of April 17, 1935, saying that unless it was advised of his decision it "would have nothing from which to take our appeal, and, therefore, [we] request that prior to forwarding the matter to the General Accounting Office that you render a decision on the matter and advise us so that if not satisfied we may take an appeal therefrom." In reply thereto on April 20, 1935 the Quartermaster Genéral wrote plaintiff in part as follows:

> You are apparently not aware of the procedure to be followed in forwarding claims to the General Accounting Office, which is under the jurisdiction of The Comptroller General of the United States for final settlement. The function of this office and of other Governmental Departments in forwarding claims to the General Accounting Office is to assemble all pertinent data and make a definite determination of fact. Any recommendation this office may make in transmitting these claims is confidential and the law prohibits the divulging of the nature thereof.
>
> After your claim has been passed upon by the General Accounting Office it will advise you what disposition has been made thereof and will definitely outline the reasons for allowing or disallowing the various items

of your claims. If you are of the opinion that the findings of the General Accounting Office are based upon an erroneous statement of fact or additional evidence has arisen which might cause it to reverse its decision, you are at liberty to present your case to that office for reconsideration.

The Quartermaster General had an entirely erroneous conception of his duties under the contract. The contract called for decisions by him, and not by the Comptroller General, and the plaintiff, of course, was entitled to be advised of his decision. Since the Quartermaster General misconceived his function, he did not follow the provisions of the contract, and his failure to do so made it impossible for the plaintiff to avail itself of its contractual right to appeal to the head of the department. It follows, therefore, that its failure to appeal is no bar to its prosecution of its case in this court. We proceed, therefore, to consider the merits of the several items of plaintiff's claim.

Claim for additional backfilling

The contracting officer disallowed this claim in his letter of October 22, 1934, on the ground that the unit price of $1.00 per cubic yard for earth excavation included backfilling. Apparently this is true. Plaintiff's president admitted on cross-examination that in figuring on the original contract his estimate for excavation included the cost of backfilling. It would appear, therefore, that when the plaintiff bid $1.00 a cubic yard for additional earth excavation it meant that to include the cost of backfilling.

Defendant's inspector had directed plaintiff to move all surplus earth to a place about 200 yards away, except so much of it as was needed for backfilling. The plaintiff did not leave sufficient earth near the foundation walls to do all the backfilling required and had to bring back some that had been removed. This was its own fault and it is not entitled to compensation therefor. Just what part of the $795.24 claimed for this item is the cost of moving the dirt back, and what part is the cost of depositing it against the basement walls and tamping it down, is not shown.

Plaintiff has not established a case entitling it to recover on this item.

Claim for additional cost of constructing fireplaces

The contract drawings for the fireplaces show a row of bricks laid one on top of the other on the sides of the fireplace and a row of bricks on the top placed at an acute angle to the bricks on the side. The specifications call for common brick; they say, "Face brick for fireplaces shall be selected from common red brick."

Plaintiff so constructed two of the fireplaces, but Edmunds, the inspector on the job, told plaintiff that the contract drawings required the top of the fireplaces to be constructed of specially manufactured moulded brick, and he ordered the two fireplaces torn down and rebuilt with these specially moulded brick. There was no warrant for this action in either the drawings or specifications. Plaintiff built the two fireplaces just as it was required to build them.

To have secured the specially moulded brick insisted upon by Edmunds would have been more expensive, and plaintiff suggested in lieu thereof that it be allowed to build the fireplaces in accordance with a design submitted by it, providing for a brick and a half at the top of the fireplace instead of one brick as shown on the original drawings. This was permitted and the rest of the fireplaces were constructed in accordance therewith. The excess cost thereof was $393.00.

There was no warrant for Edmunds' insistence that the fireplaces be constructed in a way different from that specified, but plaintiff proceeded to do so without protest. Its representatives did not take the matter up with the contracting officer, nor even with the Constructing Quartermaster. It cannot recover when it accedes to the demand of a subordinate without protest and without giving defendant's authorized representatives a chance to pass on the matter.

The specifications provide that "No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M. and the price stated in such order." No claim for an extra was presented to the Constructing Quartermaster. This provision in the specifications was included to save the defendant from any extra expense except such as was authorized by the Constructing Quartermaster. This was not authorized by him, and there can be no recovery for it.

Claim for additional work and material in placing mortar between tiles

The contract drawings showed a typical wall section with a 12-inch tile wall. In constructing it the plaintiff proposed to use 8-inch and 4-inch tile, instead of 12-inch tile. Defendant's inspector Edmunds approved this, but with the understanding that it would be necessary for plaintiff to fill in the joints between the tile with mortar.

Plaintiff had completed the wall on the first story of one of the buildings without filling in the vertical joints between the tile, leaving an open space of approximately one-half inch in width between the pieces of tile. The defendant's inspector required it to tear it down and to construct the wall by filling up the space between the tile with mortar. Plaintiff constructed the walls of 11 houses in this way, but later, when defendant's Constructing Quartermaster, Major Doten, was succeeded by Captain George, and the latter had issued a bulletin eliminating the necessity for filling the space between the tiles with mortar, plaintiff made claim for what it said was the extra cost of filling the spaces between the tile in the walls of the 11 buildings already constructed.

The specifications apparently contemplated that all joints should be filled with mortar. Paragraph 47 with respect to laying tile provided in part:

> * * * Fill all the joints and crevices between the tile and other work with mortar well slushed in.

When this paragraph of the specifications was drawn it was evidently contemplated that 12-inch tile would be used in building the walls, producing a solid wall. If 4-inch and 8-inch tile were used the wall would not be solid unless the spaces were filled with mortar. The defendant wanted all spaces filled with mortar. There would seem to be no reason why the defendant should have wanted the spaces between the tile and other work filled with mortar and not the joints between two pieces of tile. At any rate, it does not appear that this requirement was an unreasonable one. Plaintiff evidently did not so regard it until Captain George had changed the requirement eliminating the necessity for this.

Plaintiff is not entitled to recover on this item.

Claim for louvers

Defendant asked plaintiff to submit a bid for the construction of certain vaults requiring louvers. This plaintiff did, but its bid was rejected. Before rejection, however, defendant instructed plaintiff to go ahead and purchase the louvers, since they would be needed at once if this work was to be done, but with the understanding that if its proposal was not accepted the defendant would pay for them. When plaintiff's bid was rejected it turned the louvers over to the Constructing Quartermaster upon the inspector's instructions and obtained a receipt for them. The defendant refuses to pay for them because it says this was an "extra not ordered in writing." The defendant, however, got the louvers, it is keeping them, and should pay for them. Insofar as defendant's technical objection is concerned, we think defendant's receipt for the louvers in writing is a sufficient compliance with the requirement that extras be ordered in writing.

The plaintiff is entitled to recover $40.52 on this item.

Alleged excess cost of grinding and rubbing concrete surfaces

The specifications with reference to finishing concrete originally read as follows:

> (1) *Smooth Finish* will be required for all exposed surfaces of concrete on exterior of building. Concrete shall be rubbed with carborundum bricks to a uniform smooth finish.
>
> (2) *Rough Finish.*—All exposed surfaces of concrete or interior of building not otherwise specified, shall have all fins removed and rough edges dressed off.

This provision was amended before the contract was signed by requiring a smooth finish on both the exterior and interior of the building. The provision for a rough finish was eliminated. Defendant's agents required no more of plaintiff than was required by the specifications as amended. Indeed, the plaintiff bases its claim on the specifications before amendment. Plaintiff clearly is not entitled to recover on this claim.

Plaintiff is entitled to recover of the defendant the sum of $40.52. Judgment for this amount will be rendered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NILS P. SEVERIN, AS SURVIVING PARTNER OF NILS P. SEVERIN AND ALFRED N. SEVERIN (NOW DECEASED), FORMERLY CO-PARTNERS TRADING UNDER THE STYLE OF N. P. SEVERIN COMPANY v. THE UNITED STATES

[No. 43421. Decided May 3, 1943]*

On the Proofs

Government contract; breach by Government; damages sustained by subcontractor.—Where plaintiff, a contractor with the Government, sues for damages sustained by contractor as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor, who in his contract with plaintiff, had absolved plaintiff from any liability to him for delays caused by the Government, recovery may be had only for the loss proved to have been incurred by contractor. *Herfurth* v. *United States*, 89 C. Cls. 122, cited.

Same; assignment of claim forbidden by statute.—If subcontractor did have a claim against the Government, he could not transfer that claim to the prime contractor, since assignment of such claims is forbidden by statute; section 3477, Revised Statutes; U. S. Code, title 31, section 203. *Spofford* v. *Kirk*, 97 U. S. 484, cited.

Same; nominal damages not recoverable against Government.—Breach of contract, if the contract be between private parties, might give rise to suit and recovery of nominal damages, even if no actual damages resulted from the breach; but the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. *Nortz* v. *United States*, 294 U. S. 317; *Great Lakes Construction Co.* v. *United States*, 95 C. Cls. 479.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Mr. Bynum E. Hinton* was on the briefs.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Currell Vance* was on the brief.

The court made special findings of fact as follows:

1. Nils P. Severin and Alfred N. Severin, during all the

*Petition for writ of certiorari pending.

times material herein, were citizens of the United States and residents of the State of Illinois, and copartners doing business under the name and style of N. P. Severin Company. On July 8, 1941, Alfred N. Severin died testate and on August 18, 1941, Continental Illinois National Bank and Trust Company of Chicago, was duly appointed the executor of his will. Since July 8, 1941, Nils P. Severin has been and is now the surviving partner of the former copartnership, and as such entitled to prosecute the claims of the former partnership.

The plaintiff and the former copartnership are referred to herein as plaintiffs.

2. Plaintiffs entered into a contract with the United States August 3, 1932, to furnish all labor and materials, and perform all work required for "the construction, including approaches, etc., of the Post Office at Rochester, New York, per Bid No. 4 (using sandstone for all exterior stone work except where marble and granite are required and substituting steel casement windows for the aluminum casement windows)" for a consideration of $805,923.00, in accordance with designated drawings and specifications. The work was agreed to be completed within 540 calendar days after the date of receipt of notice to proceed. The officer contracting for the United States was Ferry K. Heath, Assistant Secretary of the Treasury. Article 18 (b) of the contract read: "The term 'contracting officer' as used herein shall include his duly appointed successor or his duly authorized representative."

Notice to proceed with the work was received by plaintiffs September 2, 1932, thus fixing the date for completion on or before February 24, 1934.

The specifications provided that the term "architect" as used therein should refer to Gordon & Kaelbar who by contract with the United States were "authorized to prepare all drawings and specifications and full-size details, pass on all shop drawings, approve or reject architectural samples as listed herein, criticize and approve plaster models or ornamental work as shown or noted on contract drawings."

Article 30 of the specifications provided: "The Supervising Architect is the duly authorized representative of the Contracting Officer."

With reference to models the specifications provided:

46. MODELS.—The Government will furnish the models indicated on the drawings. Any additional models of rights, lefts, miters, etc., and any patterns required shall be provided by the contractor.

47. Models will be delivered F. O. B. at points designated by the contractor who shall furnish the Supervising Architect with full shipping directions. The Government bill of lading will be sent to the consignee who shall fill out the "Certificate of Delivery" and surrender the Government bill of lading to the carrier as payment for the shipping charges. The contractor or his authorized agent shall receive the models, be responsible for all charges for storage, etc., after notification that the models have been shipped, and for the care of the models from the time of delivery to him.

48. The models shall be unpacked immediately and examined. Dimensions shall be verified and any discrepancies or damage shall be reported in writing to the Supervising Architect. No repairs or alterations shall be made without written instructions from the Supervising Architect.

49. The contractor shall deliver such models at the building for verification of the work executed therefrom when so directed by the Supervising Architect. After completion of the contract the models are to be destroyed, unless permission is obtained from the Supervising Architect to dispose of them otherwise.

A copy of the contract and specifications is filed in evidence and made a part hereof by reference.

3. Work on the contract proceeded and was completed by the contractors and accepted by the Government on or about March 28, 1934, without imposition of liquidated damages for any delay upon the part of the contractors.

Upon completion of the work plaintiffs presented claims to the Supervising Architect or his successor in office for alleged losses due to delay in delivery of models affecting exterior marble column caps. All the claims so presented were considered and denied.

January 26, 1934, the acting Supervising Architect of the Treasury Department transmitted to plaintiffs the following findings of fact made by him:

Reference is made to your letter of December 4, 1933, stating that you were delayed 8 weeks in connection with the delivery of models Nos. 6 and 7 affecting the exterior marble column caps at the Rochester, N. Y., Post Office.

There was some delay in awarding the model contract due to the fact that all of the bidders under the original bidding resided in cities some distance from Rochester, making it difficult for the Architects to inspect the modeling. New bids were obtained and the contract was awarded on January 14, 1933. Model No. 7 as originally designed represented an eagle and when the photographs were sent to this office for approval it was apparent that the eagle as designed would not be satisfactory as it assumed a very strained position with its wings wrapped around the curve of the column. The Architect was therefore instructed to furnish a new motif, entirely eliminating the eagle, for the column caps. The change in model No. 7 also involved model No. 6 and it was therefore necessary that both models be held up pending the submission of a new design by the Architects. Considerable correspondence took place on this subject and it was not until May 10 that the modeler's bid was accepted for the changed designed. The work was expedited as much as possible and a telegram was sent the Architects on June 17 approving the new models and authorizing shipment. The models were shipped on June 20 and the Engineer's reports show that the finished marble caps were received and set by you on August 17.

While you advised several times in the period before you received the marble caps that you were being delayed, the Engineer's reports do not indicate that the delay reached the extent of 8 weeks. Inasmuch as the portico was of wall bearing masonry construction and the completion of the major portion of the building was not dependent on the portico, the Engineer reported that the actual delay connected with these marble caps amounted to 3 weeks. He cited the fact that after the column caps were set in place you allowed considerable time to elapse before starting the finish work in the vestibule. In view of these circumstances you are entitled to twenty-one (21) additional days, due to the delay connected with models 6 and 7, due note of which will be made at time of final settlement.

Article 9 of the contract provided as follows with reference to delays:

> Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * * *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

4. The models referred to in the findings of fact by the acting Supervising Architect were necessary to the carving of exterior marble column caps at two entrances to the building, at which were porticos, the roof thereto being supported by columns, the caps of which were between column and frieze. The delay materially affected work confined to those particular areas and delayed completion of the building as an entirety. The delay was not justified and was a breach of the contract.

By reason of stoppage of work at the porticos, occasioned as found by the acting Supervising Architect, the following losses were sustained:

(a) Sub-contractor's field costs, including labor and rental of equipment	$702.00
(b) Sub-contractor's general overhead	35.10
(c) Plaintiffs' general overhead	73.71
	810.81

The losses of $702 and $35.10 above enumerated were occasioned by the uncertainty of delivery of the models referred to and the increased elapsed period of performance by the stone-setting subcontractor due thereto. The item of $702 was field overhead or cost of the necessary retention on the subcontractor's pay roll of his superintendent, stone-setter foreman, labor foreman, stone derrick man, and rental on hoisting engines and derricks, all for a period of 13 days, which is the limit of delay claimed by that subcontractor against plaintiffs herein, and for which plaintiffs acknowledge themselves indebted to the subcontractor in the event that payment for the loss is adjudged an obligation in the first instance of the defendant. Other items of alleged loss or the necessity for expense incurred thereon are not satisfactorily proved.

5. The subcontract, made between plaintiffs and the subcontractor mentioned in the preceding finding, contained the following language:

> 21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate [sic], detention, or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.

The court decided that the plaintiffs were entitled to recover only for the actual loss incurred by plaintiffs, $73.71.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiffs entered into a contract with the United States on August 3, 1933, to furnish all labor and materials and perform all work required for "the construction, including approaches, etc., of the Post Office at Rochester, New York, per Bid No. 4 (using sandstone for all exterior stonework

except where marble and granite are required and substituting steel casement windows for the aluminum casement windows)" for a consideration of $805,923.00, in accordance with designated drawings and specifications. The work was to be completed within 540 days after receipt of the notice to proceed. Plaintiffs were notified to proceed September 2, 1932, thus fixing the date of completion on or before February 24, 1934.

The defendant employed a firm of architects who were "authorized to prepare all drawings * * * criticize and approve plaster models or ornamental work as shown or noted on contract drawings." Article 46 of the specifications provided that the defendant would furnish the models indicated on the drawings. Plaintiffs proceeded with the work but they, and the subcontractor with whom they had made a contract for the cutting of the marble caps and the ornamental work, were delayed because of the failure of the defendant to furnish the models for the exterior marble column caps for the porticos which were at two entrances to the building. The roofs of the porticos were supported by the columns, the caps of which were between column and frieze.

The letter from the Supervising Architect, who was the duly appointed representative of the contracting officer under Article 30 of the specifications, to plaintiffs on January 26, 1934, shows that there was delay in furnishing models No. 6 and No. 7, due to the fact that the contract for the models had not been awarded because of faulty designs furnished to the Supervising Architect and the necessity for new designs. Award of the contract for the models was in May instead of the early part of 1933. The models were not approved until the following June and the marble caps were not received by plaintiffs until August 17, 1933.

The defendant does not deny that by reason of its failure to furnish the models plaintiffs and their subcontractor were delayed. A change order was issued extending the time for completion of the contract for 21 days. No allowance was made in this change order for the actual loss sustained by plaintiffs and their subcontractor by reason of the fact that the delay caused plaintiffs to stop work to await the arrival of the models. The subcontractor had

its force ready to go to work on the carving of the column caps. It was impossible for plaintiffs to complete the roofs of the porticos because the roofs were to be supported by the columns.

The actual delay caused to the subcontractor was for thirteen days. The actual damage sustained by the subcontractor due to the cost of labor and rental of equipment, which had to be kept idle awaiting the arrival of the models, and the uncertainty as to when they would arrive, amounted to $702.00. The subcontractor's overhead was $35.10, and the plaintiffs' extra overhead on account of this delay was $73.71.

Plaintiffs may have suffered other losses on their own account, as a result of the delay, but if so, they have not adequately proved them.

We have, then, a case in which plaintiffs are suing for damages sustained by themselves as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor. Plaintiffs may, of course, recover for their own loss, which so far as proved, was $73.71.

As to the items of $702.00 and $35.10 which represent losses of the subcontractor, we think plaintiffs may not recover. The subcontractor could not sue the Government since it has not consented to be sued except, so far as relevant to this case, for breach of contract. But the Government had no contract with the subcontractor, hence it is not liable to, nor suable by him. *Herfurth* v. *United States*, 89 C. Cls. 122.

If the subcontractor did have a claim against the Government, it could not transfer that claim to another person, plaintiffs, for example, since assignment of such claims is forbidden by statute. R. S. 3477; 31 U. S. C. 203. The Supreme Court said of this statute, in *Spofford* v. *Kirk*, 97 U. S. 484, 488, 489:

> It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.

See also *National Bank of Commerce* v. *Downie*, 218 U. S. 345; *Seaboard Air Line Ry.* v. *United States*, 53 C. Cls. 107; *Packard Co.* v. *United States*, 59 C. Cls. 354.

If, then, we regard the subcontractor as the real party in interest in this claim, we are faced with a legally forbidden attempted assignment of a non-existent claim.

If we look at plaintiffs as the real party in interest in their own suit, we encounter these facts. Plaintiffs did have a contract with the Government. That contract was breached. That breach might, if the contract had been one between private persons, have given rise to a right to win a suit, and to recover nominal damages, even if no actual damages resulted from the breach. But the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. *Nortz* v. *United States*, 294 U. S. 317, 327; *Great Lakes Construction Co.* v. *United States*, 95 C. Cls. 479, 502.

Plaintiffs therefore had the burden of proving, not that someone suffered actual damages from the defendant's breach of contract, but that they, plaintiffs, suffered actual damages. If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit. Here, however, the proof shows the opposite. The subcontract, which is in evidence, shows that plaintiffs and the subcontractor agreed with each other as follows:

> 21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate (sic), detention or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.

Thus plaintiffs, effectively so far as we are advised, protected themselves from any damage by way of liability over to the subcontractor for such breaches of contract by the Government as the one which occurred here.

Plaintiffs must, then, so far as their claim includes items of losses suffered by their subcontractor, be merely accommodating another person who was damaged, by letting that other person use, for the purposes of litigation, the name of plaintiffs, who had a contract and could properly have sued if they had been damaged. Orderly administration of justice, as well as the statute against assignment of claims, seem to us to forbid that.

Plaintiffs may recover $73.71.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

WHALEY, *Chief Justice*, dissenting:

I cannot agree with the majority opinion.

There is no legal or equitable assignment involved. This is an action by a contractor to recover damages suffered by himself and his subcontractor, occasioned by the delay of the defendant. It is admitted that defendant's delay caused damages to both the contractor and the subcontractor. The plaintiff failed to prove the amount of his own damages but the damages suffered by the subcontractor were established by clear proof. The majority opinion admits that the subcontractor was damaged in the amount of $737.10 by allowing overhead on this amount to plaintiff.

For fifty years it has been the settled doctrine of this court that a contractor could bring suit for himself and his subcontractor for losses occasioned by delay by the defendant before payment was made to the subcontractor. In innumerable cases from *Stout, Hall & Bangs* v. *United States*, 27 C. Cls. 385, to *Consolidated Engineering Company*, No. 43159, decided February 1, 1943 (98 C. Cls. 256), this doctrine has been uniformly followed and never been questioned.

We must bear in mind that general contractors usually sublet specialized work like plumbing and electrical installations to subcontractors. The effect of the majority opinion would be to compel such subcontractors, and they are legion in numbers, to sue in their own names, which they could not do for lack of privity with the United States. This anomalous situation has never been recognized by this court in all

its history. And the majority opinion cites no case in the Supreme Court in which subcontractors have been held to be assignors of claims against the United States, merely because they were unfortunate enough to be subcontractors.

The subcontractor of plaintiff agreed in his contract not to hold the contractor for "loss, damage, detention or delay caused by the owner."

The contractor is the plaintiff in this action. The subcontractor is not suing the contractor or the defendant. Plaintiff is suing for himself and his subcontractor for an admitted loss. The defendant was not a party to the subcontract. No consideration has been paid by the defendant for the protection given the contractor in the subcontract and without it the defendant cannot avail itself of this defense.

In my judgment it is a travesty of justice to allow plaintiff overhead on the losses suffered by his subcontractor and to deny recovery to plaintiff for his subcontractor of the amount admittedly due him from the defendant, which any court of equity would require the contractor to pay over to his subcontractor after payment to him by the defendant.

I think plaintiff is entitled to recover $810.81.

JONES, *Judge*, took no part in the decision of this case.

REGO BUILDING CORPORATION, A CORPORATION, v. THE UNITED STATES

[No. 44077. Decided May 3, 1943]

On the Proofs

Government contract; requirements as to basis of bids and increases and decreases in contract price.—Where the specifications upon which plaintiff submitted its lump sum and unit price bids expressly required plaintiff to submit its lump sum proposal based on earth excavation in the total quantity indicated on the drawings, and also required plaintiff to submit unit prices for earth and work excavation to be used for increases and decreases in the lump sum contract; it is *held* that under the terms of the contract the defendant was entitled to decrease the lump sum contract price by the unit price bid for earth for the number of cubic yards of earth not excavated because

displaced by rock when making payment for rock excavation at the unit price bid therefor, and plaintiff is not entitled to recover the amount of such decrease.

Same; decision of contracting officer; appeal.—Where the evidence submitted by plaintiff when considered in connection with the provisions of the contract, specifications, drawings and the evidence submitted by the defendant, fails to show that any of the decisions of the contracting officer or the head of the department on appeal exceeded the authority conferred by the contract; and where the evidence of plaintiff fails to show that any of the decisions were unreasonable or arbitrary; it is *held* that plaintiff is not entitled to recover.

Same.—Under article 15 of the Standard Government Construction Contract, the decisions of the contracting officer and the head of the department on appeal are final as to all disputes concerning questions arising under the contract.

Same.—The contract, article 3, gave the contracting officer authority to make changes in the work called for by the contract, to order additional work under article 4 to meet unforeseen or changed conditions, and to order extra work under article 5 deemed by him to be necessary in connection with the work called for by the contract.

Same.—Where the decisions of the contracting officer were within the clear authority conferred upon him by the contract and were in no way unreasonable or grossly erroneous; and where plaintiff made no protest against such decisions and took no appeal to the head of the department as required by article 15 of the contract; plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Max E. Greenberg for the plaintiff.

Mr. D. B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $19,467.06 on seven separate items of a claim made under a contract with the defendant November 1, 1933, for the construction of twenty-one double sets of junior officers' quarters and general excavation, grading, and utilities extensions at West Point, New York. The several items of the claim are explained in the findings.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. November 1, 1933, plaintiff entered into a formal contract with defendant whereby, for a consideration of $538,250,

plaintiff agreed to furnish all labor and materials, and perform all work required for the construction and completion at West Point, N. Y., of 21 double sets of junior officers' quarters at $22,060 per double set, $463,260, and general grading and utilities extensions, $74,990, in accordance with Specification No. 6519–34–12, dated October 6, 1933, and an Addenda thereto dated October 11, 1933, Drawings Nos. 6519–102, sheets 1 to 12 inclusive, and the Schedule of Unit Prices, 43 Items, dated November 1, 1933—the work to be completed on or before March 15, 1935, and liquidated damages in the sum of $5 per double set of quarters to be assessed against the contractor for each calendar day of delay beyond the date set for completion not excusable under the terms of the contract. The contract was completed and the buildings were accepted within the time specified as extended by reason of the changes and unusually severe weather.

2. The schedule of unit prices mentioned above which was required as a part of plaintiff's bid, and which was incorporated in the contract as a part of article 1 thereof, was, so far as pertinent in the present case, as follows:

> The following listed unit prices shall be used as a basis in making deductions from or additions to the contract price, provided any deviation from the drawings and specifications decreases or increases the amount of work indicated and required therein. These prices include the furnishing of all labor and material complete in place, except as otherwise noted, as appears in bid:
> 1. Excavation, general, earth, $.75 per cu. yd.
> 2. Excavation, general, ledge rock, $3 per cu. yd.
> 3. Excavation in trenches, earth, $1.50 per cu. yd.
> 4. Excavation in trenches, ledge rock, $8 per cu. yd.
> 5. Concrete, Type A, including forms, $12 per cu. yd.
> 6. Concrete, Type B, including forms, $13 per cu. yd.
>
> * * * * *
>
> 11. Brick, face, in walls, $60 per M.
> 12. Brick, common, in walls, $30 per M.

This schedule of unit prices contained forty-three separately described items and the unit price with reference to each item to be used in making payments to the contractor in case it was found necessary during performance of the contract to make deductions from or additions to the work,

otherwise indicated and called for, provided that any deviation from the drawings or specifications decreased or increased the amount of work required thereon.

As to the various items listed and described in this schedule, it was the purpose and intent that the unit prices mentioned should be used for making deductions from the contract price and for determining the amount to be paid in addition to the lump-sum contract price in the event of changes or additional work due to unforeseen or changed conditions, extra work, or work in addition to that indicated and described in the drawings and specifications of the character specified in the schedule.

3. The defendant's contracting officer, Edwin V. Dunstan, Captain, Quartermaster Corps, Constructing Quartermaster, wrote the specifications dated October 6, 1933, which became a part of the contract, and, also, the schedule of unit prices, which was filled in by plaintiff at the time it made its bid. He drew these specifications in the light of the contract drawings, which were also signed and approved by the contracting officer October 6, 1933. Copies of the contract, specifications and drawings are in evidence and are made a part hereof by reference.

4. The contract provided that four double sets of quarters at specific lump-sum prices might be added to the contract without changing time of completion, and on November 29, 1933, the contract was increased by the addition of these four sets of quarters at a price of $87,250, thereby making the lump-sum contract price $625,500. The order making this increase was designated as Change Order A.

March 8, 1934, Change Order B was issued relating to a manhole and drain, increasing the contract price by $377.07 without change in time of performance.

April 17, 1934, Change Order C was issued relating to drain, increasing the contract price by $608.29 without change in the time of completion; and on August 1, 1934, Change Order D was issued in connection with roofing, ventilation, lintels, and porch ceilings, increasing the contract price by $64.08 without change in time of completion. None of these Change Orders, A to D, inclusive, are involved in plaintiff's claim.

5. Change Order E was issued January 24, 1935, increasing the contract price by $30,921.45 and the time for completion by 45 days. This change order, in addition to other matters not here pertinent, allowed an increase of $16,663.21 in the contract price, stated as the difference between the increase for 7,405.875 cubic yards of general rock excavation at $3 per cubic yard and the decrease for the same number of cubic yards of general earth excavation at 75 cents per cubic yard; an increase in the contract price of $3,688.35, stated as the difference between the increase for 567.437 cubic yards of rock excavation in trenches at $8 per cubic yard and the decrease for the same number of cubic yards of earth excavation in trenches at $1.50 per cubic yard; and an increase in the contract price of $4,770.28, being 397.523 cubic yards of Type A concrete at $12 per cubic yard for extra foundations.

January 28, 1935, the contracting officer extended the time for performance by 33 calendar days because of unusual and severe weather.

Change Order F was issued May 25, 1935, increasing the contract price by $3,312.96 and the time for performance by 61 calendar days. In addition to other changes not pertinent to this case this order increased the contract price by $103.01, being the difference between the increase for 45.78 cubic yards of general rock excavation at $3 per cubic yard and the decrease for the same number of cubic yards of general earth excavation at 75 cents per cubic yard, and by $138.51, being the difference between the increase for 21.31 cubic yards of rock excavation in trenches at $8 per cubic yard and the decrease for the same number of cubic yards of earth excavation in trenches at $1.50 per cubic yard.

Change Order G was issued July 25, 1935, decreasing the contract price by $539.96 and increasing the time for completion by 15 days. In calculating the decrease in contract price there was indicated in the change order 72 cubic yards of general rock excavation at $3 a cubic yard, $216, and a decrease for the same number of cubic yards of general earth excavation at 75 cents a cubic yard, $54, a net increase of $162.

6. In these change orders the contracting officer allowed as an increase the unit prices of $3 and $8 per cubic yard

for general and trench rock excavation and deducted from the lump-sum price named in the contract for general earth excavation the unit price of 75 cents per cubic yard, named in the schedule of article 1 of the contract, for the same number of cubic yards of general earth excavation displaced by rock, thereby making a total deduction from the lump-sum contract price of $6,525.86 for earth not excavated because displaced by rock.

The contracting officer paid plaintiff as an increase in the contract price the difference between the total amount for rock excavation at the unit prices for such rock and the total amount for earth excavation not done, computed at the unit price of 75 cents specified for earth.

This deduction by the contracting officer of $6,525.86 from the lump-sum contract price in determining the net amount to be added to the contract price on the basis of the unit prices per cubic yard for general and trench rock excavation constitutes item 5 of plaintiff's claim in which it is insisted that the unit prices for rock excavation set forth in the schedule should have been paid without any decrease in the lump-sum price on account of earth displaced by rock.

7. There was no agreed estimate of the total amount of excavation required by the contract either separately, as to class of excavation, or in the aggregate, nor was the price per cubic yard, except for the purpose of increasing and decreasing the lump-sum price as set forth in the schedule of unit prices, agreed upon with respect to the excavation indicated or required by the original drawings and specifications.

8. Practically all change orders were issued by the contracting officer after the work required by him and covered by such change orders had been completed. This practice was with the knowledge and approval of the head of the department and an arrangement theretofore made with the contractor. The reason for this practice and arrangement was, as given by the contracting officer, that where quantities were necessary to be determined as the basis for any additional payment that might be due on account thereof the issuance of the change order would, in such case, be postponed until the work to be covered by the change order had been performed and the actual quantities definitely deter-

mined, and, in that way, the total amount finally determined to be due and the final decision as to whether it was extra work could be set forth in the formal change orders. Change Orders E, F, and G were issued and the amounts determined by the contracting officer to be due under his interpretation of the contract were issued after the amount of rock excavation covered thereby had been performed, and the change orders so issued were thereafter approved by the head of the department.

9. The contract and specifications required plaintiff to perform all work of excavation and fills, including excavation for the cellars or basements of the several buildings, to the levels and grades as shown on the contract drawings, whether such excavation constituted earth or rock, and whether certain indicated trench excavation for sewers, drainage, and utility lines was in earth or rock. But the price to be paid to the contractor for general and trench excavation in rock was, by an express stipulation, not to be included in the lump-sum bid and the lump-sum contract price. The specifications specifically provided that the lump-sum bid price and the contract price would be based on earth excavation in the total quantity indicated and called for by the drawings, and that in case ledge rock was encountered the contract price would be adjusted in accordance with the unit prices stated in the contract. Paragraphs 1 and 4, page 9 of the specifications, and paragraphs 5 and 8, page 10, entitled "Clearing of Site, Excavating, Filling and Grading" provided as follows:

> 1. *Scope of Work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all excavating, grading and backfilling required to permit the construction of the buildings and utilities shown on the drawings or specified and the grading around same in strict conformity with these specifications and the accompanying drawings. The bidder's lump sum proposal and the contract shall be based upon general earth excavation in the total quantity indicated by the drawings. General excavation means all excavation except that in trenches for pipes or conduits. The U. S. shall have the right to revise lines and grades from those shown on the drawings and in case such revisions result in changed quantities of excavation, or in case ledge rock is encountered,

the contract price shall be increased or decreased in accordance with the Unit Prices stated in the contract. Ledge rock means any substance that in the opinion of the C. Q. M. can best be removed by blasting.

4. *General Excavation*.—Do all excavating of every description and of whatever substances encountered, to the dimensions and levels shown on drawings. All excavated material not required or not deemed suitable by the C. Q. M., for filling and grading, shall be removed and deposited where and as directed by the C. Q. M. within one mile of the point of excavation. Excavations for footings of all descriptions shall be carried down to the depths and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown on drawings, the excavation shall be carried to such levels as may be necessary and approved by the C. Q. M. Authorized increase or decrease in amount of excavation shall be paid for by, or credited to the U. S. as per amount mentioned for excavating under "Unit Prices" of bid. Care shall be taken not to excavate beyond the depths shown on drawings, as no backfilling under footings will be permitted, and any excess below the levels required shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact undisturbed bottoms. Excavations shall be maintained in good order during the progress of the work and, if necessary, sheet piling shall be used and maintained in position until removal is authorized by the C. Q. M.

5. *Rock Excavation*.—Should ledge rock be encountered it shall be stripped of overlying material and a survey shall be made by authorized representatives of the C. Q. M. and the contractor to determine the quantity of rock to be removed and paid for by the U. S. in accordance with the Unit Prices named in the contract. Measurements will be taken to lines one foot outside of walls and to the bottom of prospective floor bases. Blasting shall be done at such times and with such protective measures as the C. Q. M. may require and the contractor shall be solely responsible for any damage to persons or property due to his operations. Any such damage shall be made good promptly upon demand by the C. Q. M.

8. *Trench Excavation*.—The bidder's lump sum proposal and the contract shall be based upon the total quantity of earth excavation in pipe and conduit trenches as shown on the drawings. The U. S. shall have the right to revise the lines, grades and dimensions of such trenches

from those shown on the drawings, and in case such revisions result in changed quantities of excavation, or in case ledge rock is encountered, the contract price shall be increased or decreased in accordance with the Unit Prices stated in the contract. Where trenches are excavated in rock they shall be carried six inches below the grade of the bottom of the pipe or conduit and filled to that grade with approved material well compacted just before laying the pipe. Bell holes shall be excavated wherever necessary to insure the pipe resting for its entire length on solid ground. All trench bottoms shall be approved by the C. Q. M. before pipe is laid therein.

10. Plaintiff sublet the excavating and grading work to a firm known as Ward Bros. This firm had had long experience in such work and in making bids therefor. The site was visited and examined and the engineers of Ward Bros. made a computation and estimate of the amount of excavation called for and required by the contract specifications and drawings. Ward Bros., in computing its lump-sum bid to plaintiff, estimated and computed an amount to cover the cost, reasonable overhead, and profit of the general and trench excavation work, which it considered to be indicated and required by the drawings and the specifications, to the depths and elevations indicated and set forth on the drawings based on earth excavation in the total quantity indicated by the drawings over the area where the drawings indicated the buildings and surrounding finished grounds would be located. At the same time Ward Bros., the subcontractor, computed unit prices per cubic yard for general and trench rock excavation in the event ledge rock should be encountered in excavating to the elevations shown on the contract drawings, and, also, in the event extra rock or earth excavation, in addition to the amount of excavation indicated by the drawings, should become necessary as the result of a change order under article 3, or due to unforeseen conditions under article 4 of the contract.

In arriving at the unit-price bids to plaintiff of $3 a cubic yard for all general rock excavation and $8 a cubic yard for all trench rock excavation, the subcontractor interpreted the specifications above quoted and the schedule of unit prices as providing that should ledge rock excavation be encountered within the elevations and grades indicated and

shown on the drawings, neither it nor plaintiff would be entitled to payment for both earth and rock excavation, that is, for earth displaced by rock within the measurements indicated by the drawings. In making its lump-sum bid to plaintiff for general and trench excavation in earth and its bid to plaintiff of unit prices for rock excavation, the subcontractor took into consideration the fact that it would not be entitled to payment for earth not excavated because displaced by rock, and, in computing its lump-sum bid and its bid of unit prices to plaintiff, the subcontractor intended that the unit prices per cubic yard for rock should represent the net additional amount to be paid to it without any reduction in its lump-sum bid price on account of earth not excavated because displaced by rock. There is no evidence that this method of computing its lump-sum and unit-price bids was communicated by Ward Bros. to plaintiff before the subcontract or the contract with the government was signed. The record does not disclose how much the subcontractor reduced its lump-sum estimate for the total quantity of excavation called for based on earth excavation or, if it reduced its estimate for rock excavation per cubic yard, how much such estimate was reduced in arriving at the unit prices bid to plaintiff. The record does not disclose the amount of the subcontractor's first estimate for earth excavation in the total quantity indicated or its final lump-sum estimate bid to plaintiff in connection with its unit price bid for rock excavation. The unit prices which the subcontractor bid to plaintiff for general rock excavation and rock excavation in trenches were $2.50 and $7.50, respectively. In making its unit-price bid to defendant plaintiff simply added 50 cents per cubic yard to the bid of its subcontractor for rock excavation. These unit prices applied to all rock excavation whether it was within the amount of the total excavation indicated on the drawing or was in addition to such excavation ordered as an extra under articles 3, 4, or 5 of the contract. Plaintiff used the subcontractor's lump-sum bid for earth excavation and fills as a basis for its lump-sum bid to defendant for such work. The record does not show what amount plaintiff included in its lump-sum bid to the government for the total quantity of excavation based on earth,

or how much plaintiff increased the bid of its subcontractor for such work when making its bid to the government.

Plaintiff did not indicate to the government when submitting its lump-sum and unit-price bids or at any other time before January 14, 1935, more than a year after the contract was signed, that it intended the unit prices for rock to be net without any decrease in the lump-sum contract price for earth not excavated because displaced by rock.

The evidence is not sufficient to show that plaintiff, when computing and making its lump-sum bid and its bid of unit prices for rock excavation to the government, definitely considered the matter of whether or not in making payment for rock at the unit prices bid the lump-sum contract price would, under the language of the specifications, be decreased at the unit price bid for earth not excavated because displaced by rock. The schedule of unit prices stated that the "listed unit prices shall be used as a basis in making deductions from or additions to the contract price, * * * except as otherwise noted, as appears in bid." Plaintiff made no notation or exception to the contrary in its bid. The encountering of ledge rock constituted a "deviation from the specifications" which decreased "the amount of work [earth excavation] indicated and required therein" within the meaning of the specifications and the schedule of unit prices.

11. Prior to the issuance by the contracting officer of Change Order E on January 24, 1935, with reference to the basis of payment for rock excavated for certain of the buildings, which basis and method of payment for rock excavation was applied and followed in Change Orders F and G, the contracting officer on January 4, 1935, wrote plaintiff a letter stating his computation of the quantity of general ledge rock excavation and rock excavation in trenches up to the date of the letter and setting forth that in the change order which he would issue therefor the contract price would be increased by an amount computed at the unit price of $3 a cubic yard for the number of cubic yards of general rock excavation and $8 a cubic yard for the number of cubic yards of trench rock excavation to that date, and that, as provided in the specifications and the schedule of unit prices, the lump-sum contract price would, at the same time, be decreased in an amount computed at the rate of 75 cents per

cubic yard, as set forth in the schedule, for the same number of cubic yards of earth displaced by the rock excavation in connection with general excavation and $1.50 a cubic yard for earth displaced for rock excavation in trenches, and the difference between the amount of the increase and decrease, so computed, would be paid as an extra.

On January 14, 1935, plaintiff replied to the letter of the contracting officer with reference to the proposed change order for rock excavation and agreed to the total quantity of rock excavation computed by the contracting officer to January 4, but protested his decision to include in the change order a deduction for the same number of cubic yards of earth displaced by rock at 75 cents and $1.50 per cubic yard. This protest of plaintiff was as follows:

> Answering your letter of January 4, 1935, with regard to the change order of the rock excavation on the above job, please be informed that we are in agreement as to the total quantity of general ledge rock and also to the total quantity of rock in trenches, up to the date of your letter.
>
> We cannot agree insofar as the method of payment is concerned as we do not see the justice in deducting for the same quantity of earth at the stipulated unit price.
>
> It was our intention at the time the unit prices were submitted that the unit prices for general rock would be $3.00 net and for trench rock $8.00. You obviously reduced the original unit price to a figure which is much less than was our intention of receiving for this type of work.
>
> We therefore object specifically to the deduction for the same quantity of earth as is being allowed for rock at the unit price stipulated for earth in our contract.

On January 15, 1935, the contracting officer wrote plaintiff another letter in connection with the proposed change order for rock excavation in reply to plaintiff's letter of January 14, 1935, quoted above. In this letter the contracting officer reaffirmed the position he had taken in his first letter.

On January 23, 1935, plaintiff's president and the contracting officer had a conference with reference to the proposal of the contracting officer to increase the contract price by reason of rock excavation by the unit price bid for rock and to decrease the lump-sum contract price by the unit price bid for earth; and, on the same day, plaintiff replied in writing

to the contracting officer's letter of January 15 further protesting this decrease at 75 cents for earth displaced by rock, as follows:

As per our conversation of today we hereby reply to your letter of January 15, 1935 in connection with the change order for rock excavation.

As already discussed we are in absolute agreement as to the quantity involved. The only question at issue at the present time is the deduction of earth at the unit price where rock was encountered.

As you are already aware strenuous objections have been raised by our excavation sub-contractor to the aforementioned deductions and it is for that reason that we find it necessary to object to same.

We are transmitting herewith as to why such deductions should not be made.

It was obvious at the time of the making of the contract that for every yard of rock encountered there would be one less yard of earth to be removed. In fixing a unit price of $3.00 per cubic yard for rock, certainly it was understood by us that the fixing of a unit price made due allowance for the nonremoval of earth in the quantity and in the places where rock was encountered. Otherwise we could see no purpose in fixing a unit price of $3.00 per cubic yard for rock.

We refer now to the letter of January 15th of the Constructing Quartermaster. It states that the lump-sum contract contemplates excavation to reach the finished grade lines indicated on the drawings upon the conditions that all excavation is to be considered earth. In other words, if all excavation for this project had been in earth the cost of all such excavation would have been included in the lump-sum contract. To that point we are in accord with the Constructing Quartermaster. It then states that the contract further provides that where ledge rock is encountered the excavation of that material shall be paid for in accordance with unit prices named in the contract, and that it is obvious that if a given volume of rock excavation is encountered the same volume of earth excavation is omitted, and that the contract provides that any decrease in the amount of excavation shall be credited to the U. S. at the unit prices named in the contract. What we said above here applies. It was just as obvious at the time the contract was made, whether our contract with the Government, as now that for every cubic yard of rock encountered there would be a yard of earth

less to be removed. With such obvious fact in mind, unit prices were agreed upon and we cannot accede to any construction which means the deduction of 75c per cu. yard for each yard of general excavation and $1.50 for each yard of trench excavation not encountered.

It would appear that the C. Q. M. particularly relies upon Paragraph 1 of the specifications. This provides that the U. S. shall have the right to revise lines and grades from those shown on the drawings and in case such revisions result in changed quantities of excavation, or in case ledge rock is encountered, the contract price shall be increased or decreased in accordance with the unit prices stated in the contract. We do not understand that these [there] has been any substantial change in lines and grades from those shown on the drawings. Were there such changes which reduced the quantity of earth to be removed, then, the U. S. would have been entitled to receive under this paragraph of the specifications an allowance or deduction. Were the lines and grades changed so as to result in an increase of earth to be removed you, [we] in turn, would have been entitled to receive an increase to your [our] contract price based upon the unit prices fixed therein for earth excavation. Rock excavation by this paragraph was contemplated as a possibility. The amount, however, apparently was unknown and was speculative. Therefore unit prices were fixed. The finding of ledge rock did not depend upon any change of the lines and grades from those shown on the drawings.

It is apparent to us that what was intended by this paragraph of the specifications that where rock was encountered, in order to remove any question as to the extra to which we might be entitled, that unit prices were established, and that we must have had in mind, that for every yard of rock encountered there would be one yard of earth that did not have to be removed. If that be so, then the fixing of the unit price per cubic yard for rock must have been upon the theory that there was included in that unit price the saving to us of the earth which did not have to be removed.

You will observe that Paragraph 5 of the specifications provides that should ledge rock be encountered the quantities shall be determined in a specified manner and to be paid for in accordance with unit prices named in the contract. Nothing contained in that paragraph speaks of any deduction and it was just as obvious when this paragraph was drawn and the contract was let that for each yard of rock encountered there would be one

less yard of earth to be removed. Reading this paragraph in connection with Paragraph 1 permits of only one conclusion, namely, that decrease in contract price mentioned in Paragraph 1 would result from change in grade and lines involving less excavation.

In view of the fact that the work involved in this change order has already been completed we wish to suggest at this time that if we are overruled as to the objections heretofore stated, that you please make payment of the amount as approved by the Constructing Quartermaster, leaving the disputed amount open without prejudice to our future rights to appeal to the head of the Department so that an additional change order might be approved if we are to be eventually sustained.

12. With these letters of plaintiff before him the contracting officer thereafter issued formal Change Order E, followed later by Change Orders F and G, relating, among other things, to the amount of rock excavation and the net amount by which the contract price would be increased on account thereof after deducting a total of $6,525.86 from the lump-sum contract price for the number of cubic yards of earth not excavated, because displaced by ledge rock encountered within the limitations of the required excavation as shown on the drawings.

13. Upon receipt of the first change order dated January 24, 1935 plaintiff, on February 15, 1935, timely appealed to the head of the department from the decision of the contracting officer as set forth in the change order "in connection with the payment for ledge and trench rock excavation" as follows:

The payment for this extra work has been made in the following manner without prejudice against our rights of appeal:

Rock Excavation—general:	
7405.875 cu. yds. at $3	$22, 217. 62
Less 7405.875 earth excavation at 75¢	5, 554. 41
	16, 663. 21
Rock Excavation in trenches:	
567.437 cu. yds. at $8	4, 539. 50
Less 567.437 cy. earth excavation at $1.50	851. 15
	3, 688. 35
Summary—General Rock Excavation	16, 663. 21
Trench Rock Excavation	3, 688. 35
Total	20, 351. 56

We object to this method of payment for the following reasons:

1. The effect of deducting the earth excavation price where rock occurred is to seriously reduce the *unit price* asked as compensation for this extra work. Such action not being contemplated when unit prices were named in the bid.

2. The effect of this deduction is absolutely inequitable as it brings the eventual remuneration far below the cost of the work actually performed.

3. The specification with relation to extra compensation for excavating of rock does not in any way whatsoever indicate that deductions for earth will be made where rock occurs. Accordingly, the unit prices named were definitely intended to be considered the full price making due allowance for the unexcavated earth.

5. [4.] We refer to the contention of the Construction Quartermaster to the effect that the excavation of earth up to grades shown on plans is part of the *lump sum contract*. We concede this point with the exception that in view of the *errors* on the original survey plan we actually removed more earth excavation than originally contemplated without any additional compensation. It would therefore be only fair and equitable to recognize the fact that we may have taken into consideration the saving of earth excavation at the time the *unit prices* for rock excavation were named.

It is surely not the intention of the United States Government to cause loss to one of its contractors. This will undoubtedly be the case if the earth deductions are made as heretofore stated.

We trust that your careful consideration of this appeal will result in a decision favorable to us.

Plaintiff's written protests of January 14 and January 23, 1935, to the contracting officer prior to the issuance of the change order were transmitted by the contracting officer to the head of the department with plaintiff's appeal and on March 6, 1935, the Secretary of War sustained the decision of the contracting officer, as set forth in the change order of January 24, in a letter to plaintiff as follows:

Your letter dated February 15, 1935, pertaining to Contract No. W 6519 qm–153 for the construction of Twenty-One (21) Double Sets (Forty-Two Single Sets) Junior Officers' Quarters and Utilities at West Point, New York, wherein you protest against a ruling made by the Contracting Officer on the method of computing

payment for rock excavation, has been reviewed by this Department in accordance with Article 15 of your contract.

After carefully considering all of the facts presented it is the opinion of this Department that under the terms of Contract No. W 6519 qm–153 additional compensation for earth excavation deducted in accordance with Change Order "E" dated January 24, 1935 cannot be granted. The decision of the Contracting Officer is sustained.

14. The contract as signed by the parties contemplated in the language of paragraphs 1, 5, and 8 of the specifications and the schedule of unit prices that where ledge rock was encountered within the lines and grades of the required excavation the unit prices set forth by the bidder in the schedule of unit prices for general and trench rock excavation would be substituted for and added to the contract price in lieu of the sum included by the bidder in the lump-sum contract price to cover earth not excavated, and that the amount of earth excavation within said dimensions displaced by the amount of rock excavation encountered would reduce the lump-sum contract price at the unit prices set forth by the bidder in the schedule for increase or decrease on account of earth excavation. The decision of the contracting officer, as set forth in Change Orders E, F, and G, as to the additional amount due the contractor under the language of the contract and the decision of the head of the department on appeal were in accordance with the terms of the contract and were, therefore, correct.

15. The language of the specifications and the schedule of unit prices was sufficient to fairly and reasonably communicate to the bidder the intention that for the purpose of payment in the event ledge rock was encountered the unit prices per cubic yard bid for general and trench rock excavation would be paid and that the lump-sum contract price would be adjusted or decreased in an amount measured by the unit price bid for earth excavation within the lines and grades set forth on the drawings.

The unit prices bid and set forth in the contract also applied to extra excavation in earth or rock not indicated on or required by the drawings, and to earth excavation indicated, but eliminated.

16. The next item of plaintiff's claim, numbered 1 in the petition, is one under which plaintiff seeks to recover $2,616.75 for alleged excess general earth excavation, at the rate of 75 cents a cubic yard, over the amount claimed to have been indicated on the contract drawings due to an error in the grading plan as to the location of the buildings on the site, for which buildings, utilities, and surrounding grounds excavations and fills were called for by the contract drawings.

Plaintiff subcontracted the grading work and entered into a subcontract with Ward Bros. for the excavation and grading required by the defendant's drawings and specifications which were submitted to bidders for use in making their bids. Among the plans so submitted to bidders was Grading Plan No. 6519–102–2. This grading plan divided the building area into 50-foot squares by intersecting coordinates and indicated at each 50-foot point of intersection the existing surface grade, the finished grade to which plaintiff was required to excavate or fill, as the case might be, and the difference between the existing grade and the finished grade, i. e., the number of feet required to be excavated or filled at that point.

The specifications provided in paragraph GC–11 that "The grades are indicated on the various drawings." Other drawings, Nos. 6519–102, sheets 1 and 5, showed a concrete boundary gutter and catch basins for surface drainage, and sheet 4 showed drainage lines.

Specifications, paragraph SC–6, required the bidders to visit the site and acquaint themselves as to the relation of the finished grade of buildings to existing grades and the natural surface of the ground. The contract drawings gave contour and locations. The buildings to be erected were not staked out at the time bids were made, or at the time the contract with plaintiff was entered into, and plaintiff's subcontractor in making its estimates and bid to plaintiff for the purpose of setting a price on the grading had to resort to the plans and the existing landmarks on the site. The area involved comprised about twenty acres, largely covered with trees and thick brush. The time between the advertising for bids and submission thereof was two weeks.

An actual survey of the site by bidders was impractical by reason of the cost, which would have amounted to about $800, and was impossible since it would have taken about a month to make such actual survey. As to the location of the buildings to be constructed on the site, and for which excavation work was to be performed, there were only two landmarks indicated on the grading plan, to wit, a stable and a pig pen. The only practical method of determining conditions from viewing and examining the site was to observe the contour and relationship to these landmarks and to compare the conditions found with those indicated on the drawings. This the subcontractor did and found that the contours in relation to these landwarks were as indicated on the plans.

The grading drawing, No. 6519–102–2, was in error with respect to the relation between the contour and the locations of the buildings. The error in the grading plan was the result of an error made by defendant's engineers of about 10 degrees in turning an angle in surveying the building area. Its effect was to mislocate, on the grading plan, the sites of the buildings to be constructed with reference to the contour lines. By reason of the error, plaintiff was misinformed as to the actual contour of the ground where the buildings were to be constructed. This error caused plaintiff to underestimate the amount of excavation required for cellars of the buildings. There is no evidence that the error in the grading plan had any effect upon the calculations of the required excavation, exclusive of that for cellars, or that the error caused plaintiff to underestimate the total amount of excavation and fill necessary to bring the ground around the buildings to the required finished grades.

17. As a part of the contract plans were drawings, No. 6519–102, sheets 1, 4 and 5. These plans, which were to be considered in connection with the grading plan, concerned the location and construction of "Water, Gas, Sewer, and Drainage System," including a concrete boundary gutter on the finished grounds of the buildings for surface-drainage purposes and the location and construction in the boundary gutter at various points of certain concrete catch basins and outlet underground drainage pipes. Elevations

were shown on the drawings at each boundary gutter catch basin.

In computing its estimate of required excavation, exclusive of cellars, plaintiff and its subcontractor referred only to Grading Plan No. 6519–102–2. The purpose of this plan was only to indicate the amount of grading and filling necessary to bring the ground area to the specified finished grades. It did not purport to indicate the amount of excavation necessary for the physical structures, such as the boundary gutter, catch basins, etc. These were shown on other drawings, Nos. 6519–102–1 and 5. Drawing No. 6519–102–4 showed the drainage lines.

Paragraphs WS–1, WS–2 (c), page 86 of the specifications, provided as follows:

> WS–1. *General conditions.*—See general specifications and Drawings Nos. 6519–102, Sheets 1–12, inclusive, which govern the water, gas, sewer and drainage systems construction where applicable.
>
> WS–2. *Scope of work.*—This section of the specification covers furnishing all material, appliances and laboı necessary to construct, test, and complete the following:
>
> *a.* Water and gas systems connected to each and every set of quarters, consisting of cast-iron mains, branches, pipes, fittings, fire hydrants, valves, valve boxes, drip pots, etc., from the point on the drawings marked "Limit—water and gas" to include the entire area to be occupied by the buildings, including the service pipes from the mains to the points where the house pipes terminate—about 5 feet outside the walls—and the connection of such service pipes with the said house piping.
>
> *b.* Sewer system consisting of sewer mains, laterals, manholes, etc., to receive the sanitary wastes of each and every set of quarters and to discharge those wastes into Manhole SMH–13. This contractor shall connect the house drains terminated about 5 feet outside the building walls to the sewer system.
>
> *c. Drainage system.*—Consisting of drainage mains and laterals, catch basins, gutters, outfalls, etc., to receive storm water from the project site and to discharge it where indicated on the drawings. This contractor shall connect the subsoil drains laid around each set of quarters under another section of the project specification to the storm drains.

All of the above-outlined work is to be done in accordance with the drawing and these specifications, and to the satisfaction of the C. Q. M."

18. The drawings specified that the bottom of the concrete catch basins should be a minimum of 2 feet below the drainage surface of the concrete boundary gutter, and also that the six-inch outlet drainage pipe of the catch basin should be 6 inches above the bottom of the catch basin and a minimum of 18 inches from the top of the catch basin in the boundary gutter to the under side of the outlet-drainage pipe of the catch basin. The contract drawings did not specifically show the elevation or elevations of the concrete drainage boundary gutter, but they did disclose and show that the boundary gutter was to be on the surface of the ground throughout. The contract drawings of the catch basins at certain points in the boundary gutter did not indicate the maximum depth thereof but did indicate, by broken lines, that the catch basins might be required to be made more than two feet deep. The boundary gutter and the catch basins therein, as shown on the drawings, were to be located and constructed with reference to the finished grades. The grading plan and the location plan relating to the finished grades of the grounds and the boundary gutter and catch basins, respectively, fairly and reasonably indicated and disclosed that the boundary drainage gutter was to be so located and constructed as to conform to the indicated minimum requirements of the catch basins for underground drainage purposes, located in the boundary gutter, unless the contracting officer should otherwise order.

The contracting officer, when the excavating and grading work was being performed, and the head of the department, after the work had been completed, so interpreted the contract drawings and specifications. These interpretations of the drawings and the specifications were not unreasonable or arbitrary. The interpretations so made resulted in plaintiff and its subcontractor excavating more general earth for the purpose of constructing the boundary gutter than had been estimated therefor, but, in making their estimates, the plaintiff and its subcontractor used only the grading plan rather than basing their estimates on a careful consideration of the

grading plan and also the other contract drawings with reference to the location and construction of the boundary gutter and the catch basins.

19. The error in the grading plan as to the contour where the buildings were to be constructed caused plaintiff and its subcontractor to underestimate the amount of excavation required for cellars or basements of the various buildings. The plaintiff's subcontractor calculated the total required general excavation as 64,233 cubic yards divided into 56,693 cubic yards for general excavation, including the boundary gutter and catch basins therein, and other utilities, and 7,540 cubic yards for cellars or basements of the buildings to be constructed. The amount actually excavated was 67,722 cubic yards of which the plaintiff claims the amount of 59,538 cubic yards was the amount required for general excavation, including boundary gutters and catch basins, and 8,184 cubic yards for cellar excavation, an excess total excavation over the total estimated by plaintiff's subcontractor of 3,489 cubic yards, which, at 75 cents per cubic yard, amounts to $2,616.75. The excess cellar excavation over the total amount estimated by the subcontractor and indicated on the grading plan was 644 cubic yards, which, at 75 cents per cubic yard, amounts to $483.

The total amount of 67,722 cubic yards actually excavated was necessary and was required by the contracting officer. The amount of general excavation, including the necessary excavation for the boundary gutter, but exclusive of cellar excavation, calculable from all of the drawings, was at least 60,182 cubic yards.

The total amount of 67,722 cubic yards excavated by plaintiff was not in excess of the amount of excavation reasonably indicated by and calculable from the contract drawings.

20. After the work had been completed, plaintiff paid its subcontractor an amount in addition to his subcontract price by reason of the subcontractor's claim for having excavated a greater number of cubic yards of earth than it had estimated would be necessary.

21. June 11, 1934, before the excavation work was performed, the subcontractor, Ward Bros., wrote plaintiff as follows:

In connection with our contract with you for certain items of excavation, grading, placing of water, gas, sewer and drainage lines, including manholes and catch basins, we wish to advise you that we have encountered various items of work which are not shown on the plans, and for which we shall submit a claim for extra compensation.

We are assembling field data which indicates that there is considerable general earth excavation in excess of the quantity shown on the plans. Our preliminary information also indicates an excess quantity of trench excavation in earth as well as items of ledge rock in both general and trench excavation.

Upon completion of our computations we will submit definite figures and claims for this extra work, but this will serve as notice that such claims are pending.

June 19, 1934, plaintiff wrote the contracting officer as follows:

> We are in receipt of a letter from Ward Bros., our excavation and grading contractor, in which they place themselves on record to the effect that they have encountered various items of work not shown on the plans and for which they will submit a proposal for extra compensation. In view of this fact, we are also placing ourselves on record in connection with this matter. We are enclosing herewith a copy of the letter submitted to us by Ward Bros., which is self-explanatory.

On June 20, 1934, the contracting officer replied to plaintiff's letter as follows:

> Your letter of June 19th with enclosure is acknowledged. It is noted that your excavation subcontractor serves notice upon you that he has claims pending for extra work in connection with the Junior Officers' Quarters project, and that you are placing yourselves upon record in this matter.
>
> The arrangements between yourself and your subcontractor as to extra work do not concern this office, but with respect to any claim for extra compensation from the United States that you may contemplate, your attention is invited to Articles 4 and 5 of your contract.

22. When the matter set forth in the above-quoted letter of plaintiff's subcontractor was brought up early in June 1934, the plaintiff and its subcontractor and the defendant's engineers in immediate charge of the work held a conference and it was agreed by all that there was an error

in the grading plan and that the engineers of the plaintiff's subcontractor and of the government would make a survey of actual conditions as the work progressed and keep accurate records of the amount of excavation work. This was done. After this conference, and shortly after receipt of the contracting officer's letter of June 20, plaintiff's president had a conference with the contracting officer with reference to the matter of possible excess excavation, by reason of the error above mentioned, over that indicated and required by the drawings and discussed the letters which had been written. At that conference plaintiff's president pointed out to the contracting officer that plaintiff's letter of June 19, transmitting letter of its subcontractor, Ward Bros., was for the purpose of making a written claim for additional compensation under the contract at the unit price stated in the schedule of unit prices in the event the total excavation required and performed should, by reason of error in the drawings, exceed the amount indicated and required by the drawings for the purpose of constructing the buildings and utilities, and grading the grounds as called for. After discussing the matter the contracting officer did not decide that there was or was not extra work involved, but stated that since the actual quantities of excavations which would be necessary under the contract could not be determined at that time he would issue instructions to his engineers to keep an accurate record of conditions as they were encountered and the amount of excavation work actually performed; that when the excavation work had been completed and the quantities determined the entire question brought up by plaintiff and its subcontractor would be taken up for consideration, and that if it should then be found that there had been an excess excavation over that indicated and required by the drawings and specifications, due to the change in contours because of error in the grading plan as to the location of the buildings, a change order would be issued.

23. Excavation and grading work, including excavation for roads, was not finished until about the time the contract was completed. At the time the contract was completed and the time came for preparation and payment of the final voucher for the contract price, including changes which had

been made by change orders up to that time, the computations by the engineers of plaintiff and the defendant of the amount actually excavated and the amount considered by them to have been indicated by the drawings and required by the contract had not been completed, and some time was required to complete them. When the voucher for final payment under the contract was prepared and submitted, plaintiff went to the contracting officer and called his attention to the claim for excess excavation and stated that the final figures with reference thereto would not be completed for several days. The contracting officer told plaintiff to sign and execute the final voucher under protest, reserving its right to file a claim for this particular item—that it was not necessary to hold up the entire final payment on that account. Thereupon plaintiff signed the final voucher for the amount of the final payment under the contract otherwise admitted to be due, reserving thereon its right to present its claim for alleged excess excavation.

As soon as the plaintiff and its subcontractor had completed their final figures from the survey made, the plaintiff prepared and filed its written claim for additional payment at 75 cents per cubic yard for about 3,489 cubic yards of earth excavation claimed to have been ordered by the contracting officer in excess of the total quantity excavated for the buildings and grounds, including the boundary gutter, as indicated on and called for by the drawings. The submission of this claim after final payment was in accordance with the understanding and agreement between the contracting officer and the plaintiff. When plaintiff completed the preparation of its claim and was ready to submit it to the contracting officer it found that the contracting officer had left West Point and had been transferred to other duties at another place. The claim was therefore sent by plaintiff to the War Department at Washington. No decision or finding on the claim was transmitted by the War Department to plaintiff but plaintiff was advised that inasmuch as the contract had been completed and final payment thereunder had been made the claim should be presented through the Comptroller General. The plaintiff also presented the claim to the Comptroller General. The War Department in a report to the Comptroller General made a

finding and determination that the total of 67,722 cubic yards actually excavated by plaintiff was not in excess of the total quantity indicated by and calculable from the contract drawings. This finding was not arbitrary or grossly erroneous. The Comptroller General advised plaintiff that its claim was denied.

24. Items 2 and 3 of the claim as set forth in the petition have been withdrawn.

25. The next item of the claim is numbered 4 in the petition. Under this item plaintiff seeks to recover $1,377.75 representing alleged excess earth excavation for roads of 1,837 cubic yards at 75 cents per cubic yard. While grading work was in progress plaintiff and its subcontractor were advised by the defendant's engineers in immediate charge of the work that the contract drawings required that roads be excavated for the receipt, or placement by others, of a finished road surface approximately 8 inches in depth. The grading plan indicated the elevation of the finished road surface, which finished road surface plaintiff was not to construct, but this grading plan and other contract drawings relating to excavation for roads considered together, and intended to be so considered, indicated and showed that plaintiff was to excavate for the roads so that each road would be ready to receive the finished road surface of about 8 inches without further excavation. In making their estimates of the amount of excavation for roads plaintiff's subcontractor and plaintiff estimated the amount required only to the elevation of the finished road surface indicated on the grading plan, rather than to the elevation indicated and shown on the grading plan and other drawings necessary to permit the laying of the finished road surface to the elevation of such finished road surface as shown on the grading plan. Plaintiff and its subcontractor objected to the interpretation of the drawings by the defendant's field engineers.

Due to the contour of the ground over the roads as laid out and the necessity of interpolating the elevations indicated, it was found that, in accordance with the instruction of the defendant's engineers, the required excavation indicated by the drawings would, at some points, be 6 inches below the finished road surface and at others as much as 12 inches below

the elevation of the finished road surface as shown on the grading plan. In order that an accurate record might be kept of the amount of excavation, which plaintiff contended would be in excess of that called for by the drawings, it was agreed between plaintiff and the defendant's engineers that the roads to which the controversy related would be excavated to an average of 8 inches below the elevation shown on the grading plan for the finished road surface. After receipt of the instructions from the field engineers of the defendant, as above mentioned, plaintiff's president went to see the contracting officer for the purpose of obtaining a change order to cover the amount of the excavation which plaintiff and its subcontractor considered would be in excess of that indicated on the contract drawings. The matter was discussed with the contracting officer. The contracting officer did not at that time decide whether this would or would not be extra work, but he stated, in substance, that he did not like the idea of having too many change orders; that the excavation for roads as ordered by the field engineers should be made and if, when the excavation was completed and the entire quantities determined, it should be found that an amount of excavation for roads had been made in excess of that shown on and required by the contract drawings a change order covering the same would be issued. Determination of a price for extra, or changed work was not necessary, since such price had been provided in the schedule of unit prices. The excavation and grading work was not completed until about the time the entire contract was completed and final payment was made. Plaintiff's claim for extra excavation for roads was prepared after payment of the final voucher, but due to the fact that the contracting officer had left West Point the claim was submitted to the "War Department" in Washington. The record does not show what determination was finally made by the War Department on this item of plaintiff's claim. Plaintiff was advised by the War Department that inasmuch as final payment had been made the claim would have to be submitted through the Comptroller General. The claim was ultimately denied. Plaintiff has not proved that this claim was not considered and decided by the contracting officer and the head of the department or, if it was considered, that the decision was erroneous.

The amount of excavation which the defendant required of plaintiff for roads was not in excess of that indicated on and required by the contract drawings.

26. The next claim of plaintiff is numbered Item 6 in the petition. Under this item plaintiff seeks to recover $3,180 as the difference between the amount paid and the alleged fair value of certain foundation walls constructed of Type A concrete 12 inches in width, including forms, below the basement floor or waterproofing-level of certain of the buildings. This work was ordered by the contracting officer because of insufficient earth support for the foundation footings at the elevations as originally shown on the drawings. The original contract drawings called for a footing of Type A concrete 20 inches wide and 12 inches in depth at the basement floor level of the buildings, on which rested a brick basement wall 12 inches wide, keyed into the footing.

The specifications under the heading "Concrete and Cement Finish Work" provided that "The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all plain and reinforced concrete and cement finish work shown on drawings or specified." Paragraphs 33 and 34 of the specifications under the same heading of "Concrete Work" provided as follows:

> *Footings.*—The Contractor shall see that the bottom of all excavations are of undisturbed soil, properly leveled before pouring footings. The footings shall be of concrete, reinforced where and as shown. * * *.
>
> *Extension of foundations, etc.*—Extension of foundations beyond dimensions given on drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of bid.

27. When excavation had been made by plaintiff to the depth indicated on the drawings for the concrete foundation footings, it was found that the soil conditions were such as to make it necessary to extend the foundations of certain of the buildings to a greater depth. The schedule of unit prices, in which plaintiff was required to set forth unit prices as a part of its bid, called for unit prices in Items 5 and 6 thereof for Type A concrete, including forms, and Type B concrete, including forms. The schedule stated that such unit prices

as bid by the contractor "shall be used as a basis in making deductions from or additions to the contract price, providing any deviation from the drawings and specifications decreases or increases the amount of work indicated and required therein. * * * These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted," as appears in bid. Under these items plaintiff bid $12 per cubic yard for "Type A concrete, including forms," and $13 per cubic yard for "Type B concrete, including forms."

The contracting officer first ordered plaintiff to extend the foundations in accordance with a design prepared by him which contemplated the construction of concrete pier footings at certain points to solid earth and to certain elevations on which were to rest concrete spandrel beams at the basement level for the support of the basement walls of brick shown on the drawings. After plaintiff had filed objections to this work at $12 per cubic yard, the contracting officer withdrew this design for the additional work and ordered plaintiff to extend the foundation downward by inserting between the brick basement wall (which remained at the same elevation at the basement floor level) and the concrete footings, of the same dimensions as shown on the drawings, a concrete foundation wall of the same width as the brick basement wall shown on the drawings, to wit, 12 inches. The brick basement wall and the concrete footings remained constant as to dimensions, and the vertical dimension of the inserted concrete foundation wall of each building varied according to the depth at which it was necessary to place the footing to obtain solid bearing. Plaintiff objected and protested in writing to the contracting officer on the grounds—first, that its bid and the contract contemplated that if the foundation footing had to be extended by reason of soil conditions, the extra wall from such footing as extended to the basement floor level should be of brick and not concrete, and, therefore, to be paid for at $60 or $30 a thousand under Item 11 or 12 of the schedule of unit prices, depending upon the type of brick used; second, that the unit price of $12 per cubic yard for Type A concrete, including forms, was not based upon walls or foundations 12 inches in width but upon mass concrete 20 inches in width, as disclosed for the footings in the

original plans; that the bid and the contract contemplated that if the foundations were extended by reason of unstable soil conditions and if brick foundation walls were not used, the extended concrete foundation wall should be 20 inches in width from the point where stable soil conditions were found to the basement floor level; that forms for a concrete wall 12 inches wide cost more per cubic yard of concrete than forms for a wall 20 inches in width; that the cost of construction was greater than $12 a cubic yard of concrete, including forms. Plaintiff therefore demanded $20 a cubic yard for the inserted concrete wall of 12 inches in width.

The contracting officer denied plaintiff's claim and plaintiff appealed to the head of the department. After consideration and recommendation by the Quartermaster General to the Secretary of War, and after an opinion by the Judge Advocate General at the request of the Secretary of War, the Secretary of War considered and denied the appeal and sustained the decision of the contracting officer.

28. The specifications contemplated and fairly and reasonably disclosed that any extension of foundations of the buildings would be of concrete. The schedule of unit prices contemplated and provided that any extra Type A concrete work ordered by the contracting officer, either as a change under article 3 or due to changed or unforeseen conditions under article 4, or as extra work under article 5 of the contract, would be paid for at the unit price of $12 per cubic yard, including forms, as set forth in the schedule of unit prices. The concrete foundation wall 12 inches in width, which was ordered by the contracting officer and paid for in accordance with the schedule of unit prices, was a change in the contract authorized by articles 4 and 3 of the contract and paragraphs 33 and 34 of the specifications.

The decisions of the contracting officer and the head of the department were in accordance with the provisions of the contract.

29. The next claim is numbered 7 in the petition and under it plaintiff seeks to recover $805.22, alleged increased cost resulting from the order of the contracting officer that plaintiff pour the concrete footing 20 inches wide and 12 inches deep and the 12-inch foundation wall resting thereon

in two operations instead of one—that is to say, that the concrete footing 20 inches wide and 12 inches deep be poured and, after it had properly set, to construct thereon the concrete foundation wall 12 inches in width from the concrete footing to the waterproofing level of the basement floor. Paragraphs 26, 29, and 30 of the specifications relating to concrete work provide:

> 26. *Handling concrete.*— * * *
> Concrete shall be deposited continuously and as rapidly as practicable until the unit of operation approved by the C. Q. M. is completed. Construction joints at points not provided for in the drawings shall be made in accordance with the provisions hereinafter specified. * * *
> 29. *Joints.*—Joints not indicated on the drawings shall be so designed and located as to least impair the strength and appearance of the structure. * * *
> 30. *Joints—Construction.*—Construction joints shall be provided where shown on drawings, called for in specification, or approved by the C. Q. M. The term "construction joint" shall apply only to the pouring of the concrete and the steel reinforcement shall extend through as though no joint existed.
> Where construction joints are shown on drawings, they are for the purpose of dividing the pouring of the concrete into sections to permit shrinkage without subsequent cracking. Concrete deposited on one side of such joints shall be allowed to set at least seven days before the adjoining section is poured.

The instruction of the contracting officer that the footings and wall be poured in separate operations was given plaintiff when he found that plaintiff was preparing to build the forms so as to pour the footings and wall to the basement floor level in one operation. Plaintiff protested on the ground that the pouring of the footings and wall in two operations would cause it delay and increased expense. The pouring of the concrete for the footings and foundation wall in two operations, instead of monolithically, required more time and, by reason thereof, plaintiff's expenses for the whole of this work were increased by $805.22 over what it otherwise would have cost.

Paragraph GC–10, page 3 of the specifications, entitled "Interpretation of Contract", provided that "Unless otherwise specically set forth, the contractor shall furnish all

materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof."

30. Plaintiff appealed to the head of the department from the instruction and decision of the contracting officer, and the Secretary of War approved the decision of the contracting officer in a letter to plaintiff, in which he stated as follows:

> After carefully considering all the facts presented, and the terms of your contract, the ruling of the contracting officer is sustained, to-wit:
>
> (c) That the pouring of the footings and the superimposed foundation wall in separate and distinct operations is a normal procedure generally followed by all builders on such operations, primarily for the reason that the footings, after setting, provide a support for the wall form, and that the contracting officer merely insists on a masonry bond between the footings and foundation wall, and any method employed by the contractor which insures such results will be satisfactory to the Government.

The instruction and requirement of the contracting officer that the concrete footing and wall be poured in separate operations and the approval thereof by the head of the department on appeal were authorized and were in accordance with the specifications and, therefore, not unreasonable.

31. The next claim is Item 8, under which plaintiff seeks to recover $2,556 as damages by reason of alleged unreasonable delay caused by written instructions of the contracting officer that wood trim not be installed in any room of any building until a period of three weeks had elapsed after the plastering in such room, including bathroom, had been finished. This instruction was given when the contracting officer found that plaintiff intended to install the wood trim in rooms that had been plastered before the plastering had, in his opinion, properly dried. The installation of trim in a room with plastered walls and ceilings before the plastering has thoroughly dried results in the absorption of moisture by the trim, causing unsatisfactory joints and warping.

A considerable amount of plaster work was done during cold and winter weather.

Plaintiff did not make any written protest of the above-mentioned instruction of the contracting officer, nor did it appeal from his ruling to the head of the department. The instruction of the contracting officer was within the authority conferred upon him by the specifications and his instruction was not unreasonable in the circumstances. The amount of plaintiff's actual increased cost, by reason of the instruction of the contracting officer, is not satisfactorily proved.

32. The last claim of plaintiff is Item 9, under which it seeks to recover $2,405.48 representing the cost of painting the plastered ceilings of certain rooms with four coats of paint. Paragraphs 105 and 108 of the specifications relating to plaster work provided, so far as material here, as follows:

> *Application of plaster.*— * * * Plastering with cracks, blisters, pits, checks, or discolorations will not be acceptable. In all cases, the plastering throughout shall be delivered clean, *perfect, and in every respect to the satisfaction of the* C. Q. M.
>
> * * * * *
>
> *Patching and Protection.*—At such times as ordered and again after all other mechanics have finished their work, point up and patch all plastering and stucco, cutting out for same where necessary; point up around trim and other set work.
>
> Protect all finished work during the progress of plastering and stuccoing, and make good any damage done to such work. Plastering or stucco with cracks, blisters, pits, checks or discolorations will not be accepted. In all cases, the plastering and stucco throughout is to be delivered *clean and perfect and in every respect to the satisfaction of the* C. Q. M. [Italics supplied.]

Plaintiff's contract did not call for painting of plastered ceilings. The plastering work performed by plaintiff developed cracks in a number of ceilings and all such cracked plastering was rejected by the contracting officer. Most of the cracks in the plastering were in the ceilings, although some slight cracks appeared in the walls. No wall plastering was rejected. The contracting officer accepted some plaster with insignificant cracks in it, but informed plaintiff that he would not accept plastering with cracks of the size and frequency as found in the ceilings. Plaintiff did not insist that

the cracked plaster which the contracting officer rejected should be accepted as conforming to the requirements of the contract, but it did ask to be permitted to patch the cracks in the usual method of patching, i. e. by the incision of a groove and pointing up this groove with plaster. This process of patching cracks leaves traces of the repair work. The contracting officer told plaintiff that if it could patch the cracks in the rejected plastering so that the cracks and the patching would not be apparent he would accept such plastering. Plaintiff attempted to patch certain of the cracks in the plastering but was unsuccessful in its efforts to do so without evidence of patching being apparent. Plaintiff suggested to the contracting officer that the painting of the cracked ceilings might eliminate evidence of the cracks in the plastering. The contracting officer told plaintiff that he would not accept the ceilings as they were, or where the cracks were patched and the evidence of the patching remained, and informed plaintiff that he would permit it to eliminate the appearance of the cracks either by painting the ceilings of the rooms, where the unacceptable cracks appeared, with four coats of paint or by removing the finished coat of rejected plaster and replacing it. Plaintiff elected to paint the ceilings which had been rejected at the cost of $2,405.48. The proof does not show whether this amount was more or less than the amount which it would have cost plaintiff to remove the finished coat of plastering of the rejected ceiling and replaster the same. The proof does not show what actually caused the plastering of the ceiling to crack. The contracting officer attributed the cracking of the plastering to lack of proper heat in the buildings. The plastering which was rejected was put on during cold and winter weather.

33. Plaintiff did not make any written protest of the decision of the contracting officer rejecting the plaster, nor did plaintiff appeal from that decision to the head of the department.

The decision of the contracting officer rejecting the plaster, by reason of the cracks which appeared therein, and in refusing to permit plaintiff to patch the cracks if evidence of the patching remained was not unreasonable and was within the authority conferred upon him by the specifications.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts with reference to the several items of plaintiff's claim, which we have found from all the evidence submitted, preclude recovery by plaintiff. The evidence submitted by plaintiff when considered in connection with the provisions of the contract, specifications, drawings and the evidence submitted by the defendant fails to show that any of the decisions of the contracting officer or the head of the department on appeal exceeded the authority conferred by the contract, or that, in view of the provisions of the contract and the facts before them, any of the decisions of which plaintiff complains were unreasonable or arbitrary. Under article 15 of the contract the decisions of the contracting officer and the head of the department are therefore final and not subject to review here. Article 15 provided that all disputes "concerning questions arising under this contract shall be decided by the contracting officer * * *, subject to written appeal by the contractor within 30 days to the head of the department * * *, whose decisions shall be final and conclusive upon the parties thereto as to such questions."

The contract, article 3, gave the contracting officer authority to make changes in the work called for by the contract, to order additional work under article 4 to meet unforeseen or changed conditions, and to order extra work under article 5 deemed by him to be necessary in connection with the work called for by the contract.

The contractor agreed and stipulated under paragraph GC-10 of the specifications that it would furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the contracting officer would be the interpreter. The contracting officer and the head of the department were, therefore, by express stipulations of the contract made the arbiters of all disputes arising under the contract between the parties thereto. Plaintiff alleges and insists that the decisions of the contracting officer and the head of the department with reference to the items of the claim were contrary to the express provisions of the

contract, specifications, and drawings, or were unreasonable upon the facts and under the contract provisions.

In *Burchell* v. *Marsh*, 17 How. 344, 349, 350, the court said:

> The general principles, upon which courts of equity interfere to set aside awards, are too well settled by numerous decisions to admit of doubt. There are, it is true, some anomalous cases, which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents.
>
> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow (Knox v. Symmonds, 1 Ves. Jr. 369), "to induce the court to interfere, there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."
>
> Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

In *Kihlberg* v. *United States*, 97 U. S. 398, the court had before it the claim of a contractor for additional compensation under a contract for the transportation of stores between certain points which provided that the distance should be ascertained and fixed by the chief quartermaster and that the decision of the chief quartermaster should be conclusive. The court, at p. 401, said:

His [the chief quartermaster's] action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the Government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument.

In *United States* v. *Gleason*, 175 U. S. 588, 602, the court, after quoting from the above case, said:

While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. * * *.

Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549; *Chicago, Santa Fe &c. Railroad* v. *Price*, 138 U. S. 185.

Further, at pp. 607, 608, the court said:

But was it at all the case that the engineer, in refusing the last application for further extension, based such refusal wholly upon a consideration of prior condoned

> delinquencies? Even if we cannot take notice of the affidavit of Major Stickney, contained in this record, in which he states that his refusal to grant a further extension was based upon the failure of the contractors to make proper provisions during the period of the last extension for carrying on their work, and that they had not fulfilled the conditions upon which the time had already been extended, we are permitted, and indeed required, in absence of evidence of bad faith on his part, to presume that he acted with due regard to his duty as between the government and the contractors.
>
> The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. This, we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof. * * *.
>
> In other words, the plaintiffs allege that they were prevented from completing their work by force and violence of the elements and not by any fault of their own, and that the judgment of the engineer in refusing an extension was therefore wrongful and unjust. But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. Of course, such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer.
>
> But, even if we pass by the insufficiency of the allegation, we perceive no evidence, or finding based on evidence, which would have sustained a stronger and more adequate allegation.

In *Ripley* v. *United States*, 223 U. S. 695, 701, 702, the court said:

> The principal contention related to the right of the plaintiff to recover damages occasioned by the refusal of the inspector to permit blocks to be laid on the jetty as the work progressed. The contract provided that these blocks should be put in place when "in the judgment of the United States agent in charge" the core or mound had sufficiently consolidated. Until the agent determined that the core had settled, the contractor had no right to do this part of the work. No matter how long

the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of "fraud or of such gross mistake as would imply a fraud." *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549; *United States* v. *Mueller*, 113 U. S. 153.

But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties. The finding by the court that the inspector's refusal was a gross mistake and an act of bad faith necessarily, therefore, leads to the conclusion that the contractor was entitle to recover the damages caused thereby.

Item 5 of plaintiff's claim, which is considered first in the findings, relates to the refusal of the contracting officer and the head of the department to pay plaintiff $6,525.86 which it claims was due under the terms of the contract, specifications, and the schedule of unit prices made a part of article 1 of the contract. See findings 5 to 15, incl.

The contracting officer and the head of the department on appeal held that the provisions of the contract contemplated and provided that the lump-sum bid price would be based upon earth excavation in the total quantity as indicated and required by the drawings, and that if ledge rock should be encountered within the lines and grades shown on the drawings which displaced earth, upon the basis of which the lump-sum contract price was to be based, the contract price would be increased by the unit prices bid for rock excavation as set forth in the schedule of unit prices and that the lump-sum contract price would be decreased by an amount computed at the unit price, as set forth in the schedule of unit prices, for the decrease in the amount of earth not excavated because displaced by the ledge rock. Plaintiff alleges and insists that these decisions were erroneous and in violation of the express provision of the contract between the parties.

The proof submitted does not sustain this allegation. The language of paragraphs 1, 4, 5, and 8 of the specifications, quoted in finding 9, might have been made clearer with reference to the fact that the government would decrease or make a deduction from the lump-sum contract price at the unit price bid in the schedule for earth not excavated in the event ledge

rock should be encountered which displaced earth. But the language used in the quoted provisions of the specifications and in the schedule of unit prices was clear enough to put the bidder on notice that such a deduction would be necessary and, therefore, would be made by the government at the unit price bid for earth not excavated and that the contract price would be increased by an amount computed at the unit prices bid for the number of cubic yards of rock excavation in lieu of earth. In fact plaintiff's evidence in this case shows that the proper interpretation of the specifications and the schedule of unit prices is that where ledge rock displaced earth within the lines and grades shown on the drawings it would not be entitled to be paid for earth displaced by rock, and therefore not excavated, in addition to payment for rock excavation. Ward Bros., an experienced excavating contractor and upon whom plaintiff appears to have relied, so interpreted the specifications when the bids were being made. This is strong evidence that the specifications were not ambiguous so as to be misleading. When the change order was under consideration and on appeal after it was issued, plaintiff contended, in effect, that it and its subcontractor computed the amount of their lump-sum bids for excavation indicated on the drawings on the basis of general earth excavation in the total quantity so indicated by the drawings, but that in determining the unit prices for general and trench rock excavation to be bid in the schedule of unit prices they arrived at the unit prices of $3 and $8 after giving credit against their estimated lump-sum price on the basis of earth excavation in the total quantity indicated and that therefore no decrease should be made in the lump-sum contract price. In other words, that the unit prices for rock excavation were intended by them to be net, and to be added to the lump-sum contract price without any decrease therefrom for earth indicated but not excavated. The evidence is not sufficient to prove that plaintiff specifically considered the matter when making its bid to the defendant on the basis of the bid made by Ward Bros. to it. Be that as it may, the plaintiff and its subcontractor were not justified, much less authorized under the language of the contract as signed by the parties, in assum-

ing that they had the right to determine, without any disclosure to the government before the contract was signed, what amount should be taken off the lump-sum bid for earth excavation in the total quantity indicated on the drawings in arriving at the unit prices for rock excavation. The contract and specifications contemplated that the unit prices bid for rock would be paid if rock was encountered and that the lump-sum contract price would be decreased on the basis of the unit-price bid in the schedule for earth excavation, to the end that a dispute concerning the amount which should be paid for rock or the amount by which the lump-sum contract price should be decreased for earth not excavated might be avoided. Plaintiff made no disclosure to the government when it submitted its lump-sum and unit-price bids as to how or on what basis it had arrived at the lump-sum contract price or the unit prices set forth in the schedule as a part of the bid. The contract provided that the bidder's lump-sum proposal and the contract price would be based upon general earth excavation in the total quantity indicated by the drawings, and that in case ledge rock should be encountered the contract price would be increased or decreased in accordance with the unit prices stated in the contract. The schedule called for unit prices for earth and rock to be used for increases and decreases in the contract price. If plaintiff and its subcontractor in making their lump-sum and unit-price bids had followed these provisions of the specifications and the schedule of unit prices, no difficulty or controversy would have arisen. It is clear, and there is no contention to the contrary, that the unit prices bid for rock excavation applied, whether such excavation displaced earth required to be included in the lump-sum bid price or was ordered as extra and additional work through changes and extras under articles 3, 4, or 5 of the contract. Plaintiff was therefore put on notice to bid in its lump-sum the total amount to be paid by the government if all excavation indicated was earth, and, in addition, to bid a unit price for extra or decreased earth excavation and also to bid unit prices in addition to the lump-sum bid for any and all rock excavation. If plaintiff based its bid of unit prices for rock excavation on the assumption that

no decrease in the lump-sum price would be made if rock should be encountered, it failed to make its bid in accordance with the requirement of the contract. The decision of the contracting officer conformed to the requirements of the contract and was within his authority under the provision of the specifications and the schedule of unit prices.

The contracting officer did not, as plaintiff seems to contend, reduce the unit prices stated in the contract by 75 cents per cubic yard. He allowed plaintiff the full unit prices for the number of cubic yards of general and trench rock excavation and added that to the contract price, and, at the same time, decreased the lump-sum contract price by 75 cents per cubic yard for the same number of cubic yards of earth not excavated. The total amounts of the increase and decrease for the number of cubic yards involved were set forth in the change order as debits and credits, and the difference between the total amount of the authorized increase and the total amount of authorized decrease was paid. The Change Order E, which was followed in F and G, was as follows:

* * *

		Contract Price	
		Increase	*Decrease*
2. *Rock Excavation*—General 7,405.875 cu. yds. at____	$3.00	$22,217.62	__________
Less 7,405.875 cu. yds. earth excavation ________________	.75	__________	$5,554.41
Rock Excavation in trenches 567,437 cu. yds. at___	8.00	4,539.50	__________
Less 567.437 cu. yds. earth excavation in trenches____	1.50	__________	851.15

* * *

Plaintiff is not entitled to recover on this item of the claim.

The next claim in the order of the findings is Item 1, under which plaintiff seeks to recover $2,616.75 for alleged excess general earth excavation at the unit price of 75 cents per cubic yard by reason of an error in the grading drawing as to the location of the buildings in the area where excavation was called for. See findings 16–23 incl. There was an error as to the relative positions of the buildings to be constructed and the contour lines as shown on the grading plan, but the proof does not establish that this error resulted in plaintiff being required to excavate, on the whole, a greater quantity of earth than the total quantity indicated on and

calculable from the contract drawings and specifications. In making its estimate of the total quantity of general earth excavation for the purpose of making its bid and in preparing its claim here made, plaintiff did not properly consider the contract drawings having reference to the excavation for the construction of the concrete boundary gutter and catch basins.

The claim here made was prepared and submitted to the War Department after the excavation work had been completed in accordance with an understanding with the contracting officer as to the making of this claim for alleged excess excavation due to the error in the grading plan.

Plaintiff contends that the excavation required by the contracting officer in connection with the construction of the boundary gutter and catch basins, as set forth in the findings, was excess excavation not required by the contract drawings. But the proof is not sufficient to sustain this contention. The War Department made a determination denying this claim and transmitted it to the Comptroller General because the claim was filed after final payment had been made. The evidence shows that plaintiff was not required to excavate more than the total amount of excavation calculable from the drawings and required by the contract.

Plaintiff is not entitled to recover on this item of the claim.

Items 2 and 3 of the claim have been withdrawn by plaintiff.

Under Item 4 plaintiff seeks to recover $1,377.75 for alleged excess excavation of 1,837 cubic yards for roads at 75 cents per cubic yard, the unit price for extra earth excavation set forth in the contract. See finding 25. Plaintiff's evidence not only fails to establish that it excavated a greater number of cubic yards of earth for roads than the amount indicated and required by the contract drawings, but the evidence of record shows that the contract drawings indicated and called for all the excavation for roads which plaintiff was required to do.

Plaintiff is not entitled to recover on this claim.

Item 6 of the claim is for $3,180 for alleged extra work on additional Type A concrete work, including forms, which it is alleged was not covered by the lump-sum contract price, nor by the unit-price bid of $12 per cubic yard in the contract.

The facts with reference to this item of the claim are set forth in findings 6–28, inclusive This claim is not sustained by the evidence. The concrete work for which this additional amount is claimed consisted of Type A concrete foundation walls 12 inches in width and of varying heights, under certain of the buildings, which concrete walls were ordered by the contracting officer under articles 3 and 4 of the contract and paragraphs 33 and 34 of the specifications under the heading of "Concrete and Cement Finish Work."

The contracting officer had the clear right under articles 3 and 4 of the contract and the provisions of the specifications to specify the kind and size of foundation walls to meet and overcome the changed or unforeseen conditions due to unstable soil conditions. The schedule of unit prices constituting a part of the contract, on the basis of and in accordance with which the contracting officer made payment for these concrete walls, clearly provided that the unit prices listed therein "shall be used as a basis in making deductions from, or additions to, the contract price, provided any deviation from the drawings or specifications decreases or increases the amount of work indicated and required therein." At the time the contract was made it was not known and the drawings did not indicate that the foundation footings of any of the buildings would have to be extended below the point shown on the drawings at the basement floor of the buildings, except in certain instances not material here, but the specifications, as well as articles 3 and 4, expressly contemplated that it might be necessary to extend the foundations of the building beyond the dimensions given on the drawings by reason of the soil conditions. The specifications also contemplated and provided that, if it should be necessary to extend the foundations, such extensions should be of concrete. The specifications also specifically stated that the price to be allowed per cubic yard for such additional concrete would be as stated in the unit prices of the bid. One of the chief purposes of the schedule of unit prices required of bidders was to provide the basis for payment for work of this character which might become necessary and be ordered by the contracting officer under the express terms of the contract. It was the duty of plaintiff to make its unit price bid accordingly. The con-

tracting officer in ordering the construction of the extra concrete foundation walls 12 inches in width, and in making payment therefor at $12 per cubic yard, as provided in the contract for such work, clearly acted within the scope of his authority under the contract and in accordance with its terms and conditions. The fact that plaintiff may have failed, in making its bid as to the unit price to be paid for all extra Type A concrete work, to take into consideration that concrete walls or other concrete work less than 20 inches in width might be required and ordered by the contracting officer cannot be made the basis for payment to the contractor of an amount in excess of that specifically named and fixed in the contract.

Plaintiff is not entitled to recover on this item of the claim.

Item 7 of the claim is for $805.22, damages for alleged unreasonable delay resulting from the alleged unreasonable requirement of the contracting officer that the footings and the concrete foundation walls of the extended foundations of the buildings be poured in two operations, instead of one. This claim cannot be allowed. See Findings 29 and 30. The contracting officer, as held by the head of the department on plaintiff's appeal, acted in accordance with good engineering practice and normal procedure generally followed on such operations. The contracting officer also acted within the clear authority conferred upon him by the specific provisions of paragraphs 26, 29, and 30, page 51 of the specifications.

Plaintiff is not entitled to recover under this item.

The last two items, 8 and 9 of the claim, may be treated together. See findings 31, 32, and 33.

Under the first, recovery is sought of $2,556 as damages by reason of alleged unreasonable delay caused by the direction of the contracting officer that trim not be installed in the rooms of the buildings until a period of three weeks had elapsed after plaster had been placed in such rooms, including bathrooms; and, under the second, recovery is sought of $2,405.48 for the cost of painting certain plastered ceilings with four coats of paint to meet the ruling of the contracting officer rejecting the plastering of such ceilings by reason of objectionable cracks therein.

Plaintiff's contract did not require it to paint the ceilings, nor did the contracting officer require it to paint them. Plaintiff elected to paint the ceilings in lieu of removing the final coat of rejected plaster, and replacing it.

The decisions of the contracting officer with reference to both of these items were within the clear authority conferred upon him by the contract and in no way unreasonable or grossly erroneous. Moreover, plaintiff made no protest and did not appeal from the decisions of the contracting officer to the head of the department as required by article 15 of the contract. Plaintiff is therefore not entitled to recover on these items.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* and WHITAKER, *Judge*, concur.
WHALEY, *Chief Justice*, concurs in the result.
JONES, *Judge*, took no part in the decision of this case.

MERRITT-CHAPMAN & WHITNEY CORPORATION v. THE UNITED STATES

[No. 44665. Decided May 3, 1943]

On the Proofs

Government contract; labor provisions in accordance with N. I. R. A. Act.—Under the provisions of a contract which contained numerous provisions relating to the sources from which labor was to be obtained, the number of hours which employes might work, and the minimum wages which had to be paid for skilled, unskilled and intermediate grades of work, all in accordance with the terms of the National Industrial Recovery Administration Act; it is *held* that plaintiff was not, to any extent that it has proved by the evidence adduced, put to extra expense by reason of the Government's failure to furnish qualified workmen.

Same; contractual agreement.—Plaintiff has no right to complain that it was not permitted to do what it had agreed, under restrictions set forth in the contract, not to do with respect to the employment of labor.

Same.—One who has agreed to abide by a regulation cannot claim he is legally damaged by its strict enforcement.

Same; liability of Government not shown.—The evidence is not sufficient to prove that damage caused to plaintiff's property by a flood was either produced or increased in amount by activities of the Government further up the stream.

Same; decision of contracting officer final.—Where the contracting officer required contractor to add cement to the concrete mixture; and where there is no proof that the contracting officer's order, sustained on appeal to the head of the department, was not made in good faith; the decision of the contracting officer was final under the terms of the contract.

The Reporter's statement of the case:

Mr. Frederick W. Newton for plaintiff. *Mr. Huston Thompson* was on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Merritt-Chapman & Whitney Corporation is a corporation organized and existing under the laws of the State of Delaware.

2. This action was brought pursuant to an act of Congress approved July 23, 1937, 50 Stat. 533, which reads as follows:

AN ACT

To confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of contractors for excess costs incurred while constructing navigation dams and locks on the Mississippi River and its tributaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, de-

prived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

3. October 5, 1933, plaintiff made a formal contract W923-Eng-654 with the defendant and agreed to furnish all labor and materials and perform all work required for the construction of Dam No. 5, Mississippi River, including all masonry, earthwork, metalwork, and other work indicated on the drawings or required by the specifications, and such incidental work as needed or ordered in writing by the contracting officer for the consideration of the unit prices stated in the "Schedule of Quantities and Unit Prices," in strict accordance with the specifications and addenda thereto, including schedules and drawings, all of which were made a part of the contract. The consideration therefor was estimated to be $1,792,198.50. The contract was approved by the division engineer on October 13, 1933.

A copy of the contract, including the related specifications and addenda thereto, is in evidence as defendant's Exhibit 4 and is made a part hereof by reference.

4. The work under the original contract was to commence within 10 calendar days after the receipt of notice to proceed and be completed within 550 calendar days thereafter. Notice to proceed was given October 18, 1933, which fixed the original completion date as April 21, 1935. Liquidated damages at the rate of $300 per calendar day were to be assessed for each calendar day of delay in completion until the work was placed in a safe and practical operating condition as determined by the contracting officer. Thereafter

liquidated damages were to be assessed at the rate of $25 for each calendar day of delay until the remaining work was finally completed and accepted.

Thirty-seven change orders were issued which increased the total cost of the work to $2,099,772.53. Time extensions totaling 105 calendar days were allowed under these change orders. The contracting officer allowed an additional time extension of 30 calendar days on account of a strike in the plant of the steel subcontractor.

August 16, 1935, a stop order was issued suspending performance of the remainder of the contract work to provide time for completing administrative investigation and action by the head of the department on account of work relating to the construction details and operating features of the roller gates, under change order 21. This stop order was lifted on December 3, 1935, and the contracting officer determined that it had been in effect 110 calendar days.

All of the work required to be performed under the original contract and modifications thereof was completed and accepted on December 9, 1935, within the scheduled time as extended by formal change orders. No liquidated damages were assessed against plaintiff.

5. *Contract provisions concerning labor to be employed, workmanship required, and penalty for delay*

The contract was executed on United States Government Form PWA No. 51, approved September 7, 1933, and contained the following provisions, among many others:

> ART. 19. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the work is to be performed, and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies but shall be secured in the customary ways through recognized union locals. In the event, however, that qualified workers are not furnished by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, such labor may be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (a) of this article shall be observed.

The general specifications provided in paragraph 20 as follows:

20. *Organization, Plant, and Progress.*—(a) The contractor shall employ an ample force of properly experienced men and provide construction plant properly adapted to the work and of sufficient capacity and efficiency to accomplish the work in a safe and workmanlike manner at the rate of progress specified in his bid. * * *

The specifications in section 6 (a) provided:

The contractor will be required to commence work under the contract within 10 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work with faithfulness and energy and to complete the entire work within 550 calendar days after the date of receipt by him of the aforesaid notice to proceed.

Section 12 of the specifications required the work to be done and completed "in good working order, of good material, with accurate workmanship, skillfully fitted, and properly connected and put together."

Article 7 (a) of the contract required that, except where otherwise specifically provided: "* * * all workmanship, equipment and materials and articles incorporated in the

work covered by this contract are to be of the best grade of their respective kinds for the purpose."

Section 25 (d) of the specifications required that "Workmanship shall be of the highest grade and in accordance with the best modern standard practice."

6. Contract provisions concerning wages and hours

The contract provided as follows:

ART. 11. (*b*) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 30 hours in any 1 week: *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days. This provision shall supersede the terms of any code adopted under title I of the National Industrial Recovery Act.

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.20
Unskilled labor	.50

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place

at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand.

* * * * *

(d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

The above provisions of Article 18 were modified by Addendum No. 3 which added to the contract Schedule Form A containing provisions concerning the wages to be paid as follows:

WAGES.—All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all sub-contractors shall pay not less than the minimum hourly wage rates for skilled and for unskilled labor as follows:

Skilled labor	$1.20 per hour.
Unskilled labor	.50 per hour.

Bidders shall submit also in the space provided below the complete schedule of wage rates which they propose to post at the site of the work, in accordance with Article 18 (b) of the U. S. Government Form of Contract No. P. W. A. 51.

Bidders are urged to carefully read Bulletin No. 51, Federal Emergency Administration of Public Works, and U. S. Government Form of Contract No. P. S. W. 51, before preparing their bid.

The schedule of wage rates contained the rate for the several trades or occupations to be employed on the work divided into three classes, namely, skilled, semi-skilled, unskilled.

Bulletin No. 51 of the Federal Emergency Administration of Public Works, dated September 7, 1933, provided in part as follows:

SEC. 10. Employers may use organized or unorganized labor. Unorganized labor shall be obtained from local employment agencies designated by the United States Employment Service, while organized labor must be sought in the first instance from union locals. See Form P. W. A. 51, article 19 (b), which provides * * *.

SEC. 12. The 30-hour week provision of section 206, title II, of the National Industrial Recovery Act shall be construed—

(a) To permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

(b) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(c) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plant are necessary for the housing and boarding of all the labor employed.

In case the contracting officer shall determine that any project falls within the terms of (b) or (c) hereof, he shall so state in the specifications submitted to bidders.

In contracts where exception (b) has been specified, the following proviso shall be added before the second sentence of article 11 (b) of Form P. W. A. 51:

And provided further, The contracting officer having stated in the specifications for bids that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In contracts where exception (b) has been specified, the following section shall be substituted in the place of the first full sentence of article 11 (b) of Form P. W. A. 51:

(b) *Hours of labor.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week and more than 8 hours in any 1 day. The contracting officer having stated in the specifications for bids that the work will be located at points so remote and inaccessible that camps or floating plant are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

7. The site of Dam No. 5, is in the Mississippi River at mile 114.9 near Minneiska, Minnesota, 103 miles below St. Paul, Minnesota. The construction of the dam was authorized by the River and Harbor Act of July 3, 1930,[1] and it was a part of the approved program for public works under the National Industrial Recovery Act of June 16, 1933.[2] That Act appropriated several billions of dollars to be used in a nation-wide construction program commonly known as P. W. A. projects and designed to rehabilitate industry and relieve unemployment. To accomplish these purposes the Act provided, subject to specified exceptions, that individuals directly employed on a project authorized to be performed thereunder should not be permitted to work more than 30 hours in any one week. It also prescribed standards for determining the minimum wage rates to be paid for labor relating to all projects authorized by it, and also specified conditions and preferences relating to the employment of labor upon such public projects. The Act required that these conditions be made a part of all contracts authorized to be performed thereunder. The Federal Emergency Administration of Public Works, organized under the authority of Title II of the National Industrial Recovery Act, was designated as the agency to carry out the declared purposes of the Act.

8. L. C. Hammond, who signed plaintiff's bid as vice president, was in charge of operations for plaintiff until on

[1] 46 Stat. 918.
[2] 48 Stat. 195.

or about January 18, 1934, when he was superseded by James G. Tripp, engineer and vice president of plaintiff, who remained in charge during the remainder of the work. Major Dwight F. Johns, district engineer, was the contracting officer representing the Government. He was represented at the site by Virgil C. Funk, resident engineer. Walter A. Devine and Stanton C. Smith also represented the contracting officer as inspectors to see that the P. W. A. regulations relating to wages, hours, and labor classifications specified in the contract were complied with.

9. The contract provided for the building of Dam No. 5, Mississippi River, some 1,700 feet long, extending practically across the river, and consisting of 28 Tainter gates and 6 roller gates with appurtenances. Work was commenced on the Wisconsin side of the river and proceeded across to the Minnesota side, where it connected with Lock No. 5, which was being built by other contractors. On the Wisconsin side the dam connects with a nonoverflow earth dike about 3.5 miles long which extends to high ground. The work was done principally inside three cofferdams, built in sequence and so as to permit navigation of the river to continue. These cofferdams are shown in Drawing No. 5 of defendant's exhibit No. 7, which is made a part hereof by reference. Photographs of the completed project are in evidence as plaintiff's exhibits Nos. 1 and 2, and are made parts hereof by reference.

10. Prior to making the contract with the defendant, plaintiff's representative made a trip of investigation through the area where the contract was to be performed and knew that the area was largely agricultural and not industrial, and that the supply of experienced heavy construction labor in that area was very limited. Plaintiff was familiar with the labor situation in the St. Paul and Minneapolis area as well, in which area there was available a large supply of experienced heavy construction laborers, many of whom were personally known to plaintiff's representative. There was a great deal of unemployment in both areas.

11. Upon investigating the union-labor situation in St. Paul, plaintiff was unable to obtain a guarantee from the unions to furnish workmen for contracts in the river pro-

gram. Plaintiff performed the work as a nonunion project and did not at any time request the National Reemployment Service to refer union labor to the project.

12. In the general area of plaintiff's project, the largest towns were Lake City with 3,210 population, Winona with 20,850, Rochester with 20,621, and many smaller towns. The industries in the area were small enterprises, such as bottling companies, flour mills, machine shops, sheet metal workers, laundries, and general contractors. A list of towns in that vicinity, with their industries, is in evidence as defendant's exhibit No. 49, and is made a part hereof by reference.

UNQUALIFIED LABOR

13. The National Reemployment Service of the United States Employment Service at Winona, Minnesota, about 18 miles from the project, was designated as the office through which plaintiff's labor was to be obtained. This office was established in September 1933, and was in charge of a Mr. Hammer, Assistant District Manager, with assistants, including two junior interviewers who were without previous experience at that time. The office interviewed applicants for work, taking their work history, and compiling and filing registration cards of qualified labor according to the work history of applicants. The office was established to allocate labor requirements for plaintiff's project as well as for several similar projects in the general vicinity along the Mississippi River.

The National Reemployment Service, hereinafter referred to as N. R. S., had offices long established at St. Paul, Minnesota, and at Madison, Wisconsin, with experienced assistants, which made referrals to various projects of workmen from their respective states and from the nation at large.

14. Skilled labor, experienced in heavy construction work, not being plentiful within the Winona district, was exhausted practically from the beginning of plaintiff's project. For example, skilled carpenters in the Winona area were largely finish or house carpenters and builders without former experience in heavy construction work. Many of these were referred by the N. R. S. to plaintiff's project and worked there throughout its duration.

Unskilled or common labor was referred to plaintiff's project from both the Minnesota and the Wisconsin sides of the river, but most such laborers came from the Winona, Minnesota, area, where an ample supply was available, and from which section men could commute to and from the project by automobile with approximately a 25-mile drive, which N. R. S. held to be a reasonable distance to commute. Selection by plaintiff of common labor referred to it by N. R. S. was based largely on physical qualifications, as very few persons in that area had had experience in heavy construction work.

In referring skilled labor to plaintiff the N. R. S. first drew upon the Winona district, and next upon the N. R. S. office on the opposite side of the river at Fountain City, Wisconsin, which was 8 miles from plaintiff's project. If not supplied from these areas, referrals were made from the state offices at St. Paul, Minnesota, or Madison, Wisconsin, which offices drew upon the available supply of skilled labor throughout those states and from the nation at large Skilled labor was plentiful in other portions of the state especially in the St. Paul-Minneapolis area.

In making allocations of skilled labor to plaintiff's project, and also to similar heavy construction projects in progress on the river in that vicinity, the N. R. S. endeavored to refer 50% from Minnesota and 50% from Wisconsin. Some of the projects were on the Minnesota side, while some, like plaintiff's, were on the Wisconsin side of the river. In an endeavor to equalize this ratio for each state, the greater number sent to plaintiff were from Minnesota.

15. Form No. 104, prepared for use by contractors in making requests for workmen, contained a notice that plaintiff, upon being advised as to the office from which labor lists were to be secured, should notify the N. R. S. and the District Engineer, on this form, as to its exact labor requirements, the name of the superintendent in charge, the positions for which employees were desired, the number of men in each position, the dates to apply, and the date work would be started. On the opposite side of Form No. 104 was a memorandum of advice by plaintiff to the N. R. S. office, showing name of project, labor desired, and the request for lists of

workmen to be sent to the project for interview. Form No. 104, dated November 3, 1933, is in evidence as plaintiff's exhibit No. 24, and is made part hereof by reference.

At the beginning of plaintiff's work, in order to save delay and expedite the referral of labor, plaintiff initiated the practice of telephoning its labor requirements to the N. R. S. office. This practice was continued thereafter by mutual consent. The N. R. S. selected men from their registration cards in the desired classifications qualified according to their work history, and sent them to plaintiff for interview, each applicant carrying with him a referral and introductory card from the N. R. S. When applicants with cards applied to plaintiff they were interviewed, and plaintiff hired such of them as it deemed suitable for the work and declined to hire the others. Plaintiff then endorsed the cards of those it hired, returning their cards to the N. R. S. office. The N. R. S., usually at the end of the week, prepared a list from the returned cards which contained the names, occupations, and places of residence of the men so hired by plaintiff, and sent that list to plaintiff. Such a list, containing the names of men employed from October 14 to October 17, 1933, is in evidence as defendant's exhibit No. 19, and is made a part hereof by reference.

The practice described above was followed until November 3, 1933, when it was varied by plaintiff confirming its telephone requests for labor on form 104. For example, plaintiff's exhibit No. 24, showing that, on November 3, plaintiff would require the services of two carpenters to report to Mr. Bush at 7 a. m. on November 4, and also two carpenters to report to Mr. Bush at noon of November 4, was signed by J. B. Riley, plaintiff's timekeeper. This practice was followed until February 27, 1934, when another variation occurred, which will be discussed hereinafter.

Plaintiff did not request the N. R. S. to furnish, nor did the N. R. S. refuse to furnish, a list or lists of qualified workmen. Plaintiff made no request for a written ruling relating to such a list, nor did it complain or protest in writing or otherwise that it was not furnished such lists. Plaintiff has not proved that the fact that it did not receive such lists increased its costs.

16. In accordance with the provision of the specifications that the first section of the cofferdam should enclose the 14 Tainter gates adjacent to the abutment, which was to be on the Wisconsin end of the dam, the second section to enclose the remaining 14 Tainter gates, and the third section the 6 roller gates adjacent to the lock, which was being built by another contractor on the Minnesota side of the river in the channel, extending in a parallel line adjacent to the high ground, plaintiff decided to build the dam from the Wisconsin side of the river.

The work was commenced in October 1933, with Mr. Hammond in charge. October 14, 1933, plaintiff addressed the following letter to the contracting officer:

> In our conversation at your office on October 9th we discussed the desirability of placing concrete in cold weather. We propose to plant the job with steam coils and with a large boiler capacity for heating the materials and the concrete. We have ordered delivered boilers and other equipment which will be required for this heating.
>
> We are also negotiating a contract for gravel from stock piles at some additional expense to us to make sure that we have dry material for the concrete to be placed in cold weather. We know that you agree with us that the successful completion on time or ahead of time depends a lot on how much progress we can make this winter on the work on cofferdam #1.
>
> We are outlining our plan for this item of the work now with the thought that you wish to be informed in advance about our plans for prosecuting the work. We will appreciate the cooperation of yourself and your assistance to make it possible to pour concrete all winter.

October 25, 1933, the district engineer wrote plaintiff:

> In reply to your letter of October 14, 1933, you are advised that authorization for concreting in cold weather is hereby given, provided that the mixing, placing, and curing are carried out in accordance with paragraph 5–14 (g) and 5–17 (b) of the specifications and to the entire satisfaction of the contracting officer or his representative.
>
> Relative to material to be stock piled for work for the coming winter, you are advised that tests on the aggregates will be conducted as rapidly as possible, in order to minimize any delay which may be caused by rejections.

This office will cooperate with your organization to the fullest extent possible in expediting the work to be executed this winter.

Mr. Tripp, who visited the site several times on inspection trips prior to January 13, 1934, arrived at the site on that date, taking active charge of the work on or about January 18, and replacing Mr. Hammond.

At that time the spur railroad tract connecting the site of the work with the main line of the C. B. & Q. Railroad which lay about 2½ miles to the east, on the Wisconsin side of the river, had been completed. A workmen's camp was being constructed and the construction of operation houses for the use of plaintiff's engineer, superintendent, etc., was under way. Cofferdam No. 1 was under construction, and at the outer end of the cofferdam wood piles and permanent sheet piles were being driven. Form work and pouring of concrete piles were in progress. Concrete work was being done under canvas and heat. Photograph No. 21, dated January 16, 1934, illustrative of the situation then existing, is in evidence as plaintiff's exhibit No. 6, and is made a part hereof by reference.

17. Mr. Tripp was not satisfied with conditions that he observed and he reorganized the work at a large saving to plaintiff in its current expenditures. He subcontracted the reinforcing steel work at a reduction in cost from $60 to $12 per ton. Concrete gangs were reorganized by placing other foremen in charge, discharging some workmen and employing and training others. These workmen were referred by the N. R. S. office.

Up to February 27, 1934, plaintiff had been interviewing the workmen referred by the N. R. S. February 27, 1934, the contracting officer wrote plaintiff as follows:

Because of certain difficulties that have arisen in connection with ordering men for river work through our office at Winona, we would like to clarify for the contractors the procedure in making their labor orders and point out some of the undesirable consequences of ordering men for work when only an interview is intended.

In our opinion, the contractor should place a definite labor order specifying as accurately as possible when the men will be needed. Since many men will have to be called a distance of several hundred miles, we believe

it is unfair to ask them to come merely for an interview. The National Reemployment Service will make every effort to supply only well qualified men. If men report who are not fully qualified we will naturally expect them to be rejected without any consideration of the expense to them in reporting for work, but if there has been a definite labor order and a qualified man reports, we would expect the contractor to pay his expenses of transportation if he is not given employment.

It is not our intention to impose any undue burden on the contractors. At the same time, we must safeguard the interests of qualified unemployed men who are called long distances to report for work when there is no definite assurance of an opening. We believe that if a little more care is exercised by the contractors in placing their labor orders there should be no inconvenience in this respect for either the contractors or the applicants we refer to them for employment.

Plaintiff complained orally to N. R. S. and to the contracting officer about this communication, but made no written protest at any time, in accordance with Articles 3 and 15 of the contract.

18. From the commencement of the work the contracting officer permitted plaintiff to bring in a number of trained men of its own choice in supervisory positions, which practice continued until March 29, 1934, when Col. Johns, the contracting officer, sent to contractors and resident engineers the following letter:

Subject: Operators of Expensive Machinery as Key Men.
To: All Resident Engineers and Contractors.

1. It is my opinion that the number of skilled employees exempt from the thirty-hour week as being in the supervisory class, now engaged on P. W. A. projects in this District, who have been permitted to come in to the jobs as keymen, is at present sufficient to insure the safe and efficient operation of present equipment. Present personnel of the type described should be sufficient to train additional skilled operators obtained from local reemployment offices on the equipment now on hand or of equivalent type which may subsequently be brought to the work.

2. It will be the policy, therefore, to require that all additional operators for present equipment or equipment of equivalent type be obtained from the Reemployment

Agencies rather than to be brought in as keymen, until such time as it is apparent that there is not sufficient competent local labor available to meet the demands of the various jobs.

19. After receipt of this letter of March 29, 1934, N. R. S. referred a considerable number of men, many of whom were skilled in heavy construction work. Others referred were unable to operate various types of machinery such as plaintiff used. Some were able to operate a job or trolley crane in a factory, and some were efficient with a Northwest Crane, but were unfamiliar with a Bucyrus-Erie, and had either to be discharged or trained for the particular machines used.

Plaintiff did not protest in writing the direction of the contracting officer contained in his letter of March 29, 1934.

20. About May 1, 1934, plaintiff had a conference with the N. R. S. management and asked to be furnished with more qualified men. The N. R. S. asked plaintiff when making requests to be specific in detailing the qualifications of men needed.

Plaintiff complied with this request as shown by plaintiff's letters of requisition, dated May 3 and May 19, 1934, as follows:

> We wish to engage the services of four *field* mechanics. It will be necessary that they meet the following qualifications:
>
> I. Make field repairs to *all* classes of steam and gas hoisting engines, both stationary and moving types.
>
> II. Make field repairs to gasoline and steam pumps.
>
> III. Do general pipe fitting, such as connecting up well points, steam and water lines.
>
> IV. It is not necessary that these men do shop work, such as operating lathes, etc.
>
> V. We will not accept as field mechanics men whose qualifications are listed under number IV only.
>
> Our requirements are urgent We ask that you give this matter your best attention as heretofore.
>
> With reference to our requisition No. 148, for a field electrical assistant mechanic:
>
> The field electrician must be familiar with repairing electric motors, working on high- and low-tension lines and all phases of electrical field constructions. We will not see men familiar with only house wiring and doorbell experience.

The assistant mechanic must be familiar with all sorts of machines, hoisting engines, gas engines, pumps, belts, belt conveyors, and all electric motors.

His duties will be to oil and grease these types of machine properly.

Following the letters of May 4 and 19, plaintiff received trained mechanics. Plaintiff thereafter both telephoned and used written requisitions giving in detail the qualifications of desired labor.

21. July 24, 1934, the office of the contracting officer wrote plaintiff the following letter:

> There is inclosed herewith a copy of a letter which has been sent to the State Reemployment Directors of Minnesota, Wisconsin, and Iowa relative to the employment of skilled carpenters as keymen. This is as a result of complaints that I have received from a number of the contractors engaged in lock and dam construction in this district.
>
> In the event you are unable to secure a sufficient number of competent skilled carpenters through the Reemployment Service and have knowledge of men from outside areas whom you can employ, I will allow you to bring a limited number to the job as keymen. In every case an appropriate request should be made to this office, giving the names of the men in question, their positions, and a statement to the effect that you are unable to secure such men through the Reemployment Service. Men so employed should be registered at the Reemployment Agency designated for your project before working at the site.
>
> This authority is not extended for the purpose of permitting the discharge of competent carpenters obtained through the Reemployment Service in order to give employment to carpenters known to you.

The letter enclosed was issued by the contracting officer under date of July 21, 1934, and read as follows:

> At the present time employment on lock and dam construction in this District is approximately at its peak. As a result, contractors have experienced, under present hiring methods, considerable difficulty in obtaining a sufficient number of skilled carpenters to prosecute the work. Although there are quite a few carpenters in the areas local to the work, a large number of them are not experienced on heavy construction.

The contracts provide that so far as practicable and feasible, labor for the project shall be obtained through the Reemployment Service. Since it appears that contractors are not obtaining, in every case, the type of skilled labor they are entitled to, it seems necessary to waive the provision requiring employment through the Reemployment Service and to permit the induction of carpenters skilled on heavy construction from outside the local area.

For this reason, therefore, I am granting permission to contractors to employ, from outside areas if necessary, a limited number of skilled carpenters, known to them as experienced in heavy construction as keymen. All men so employed will be required to register at the Reemployment Agency designated for the particular project, so that you will be fully informed as to the extent to which this permission has been followed.

October 11, 1934, the National Reemployment Service wrote the following letter from its Madison, Wisconsin, office to the contracting officer:

The writer has just returned from a visit to La Crosse and Winona, during which time it was brought to my attention that various contractors on Mississippi River work are habitually requesting workers by name on their labor requisitions. They quote as their authority your letter of July 30, 1934, to Merritt-Chapman and Whitney.

Such procedure is at variance with N. R. S. Headquarters letter No. L-75, received from our Washington office under date of August 29, 1934. * * *

I am assured by Mr. Gernes of the Winona office, and Mr. Frederick of the La Crosse office, that at the present time we are in a position to supply qualified workmen of every type. We do, however, have difficulty in getting skilled workmen from distant parts of the state to go to the Mississippi River for intermittent employment. They state that they cannot afford to pay transportation, board, and room if they are unable to obtain more than fifteen hours of employment per week. The contractors seem to find 30 hours of employment for members of their old crew and those men who have been hired without regard to the Reemployment Service, and we can see no reason why they should not give full-time employment to the men who may be referred from our service, were they so inclined.

October 12, 1934, the contracting officer wrote plaintiff as follows:

> Reference is made to my letter dated July 24, 1934, relative to the authority granted by me to employ a limited number of carpenters as keymen on your job.
> Please be advised that I have been informed by the Reemployment Service that there is a sufficient number of carpenters on file at the various offices to supply the present demands. In view of the fact that the Reemployment Service is now able to supply the necessary carpentry labor, it is no longer necessary to bring in carpenters as keymen. This authority extended by me on July 24 is hereby revoked, and additional carpentry labor will be obtained through the usual channels.

22. There are many instances shown throughout the contract work of men being referred to plaintiff who were not experienced in what is known to the contracting and engineering trade as "heavy construction" work, but were trained in construction of a different character. It was necessary that such men have some training in order to perform efficient work under the conditions prevailing on plaintiff's large construction contract. Certain men were awkward in working on forms; carpenters, skilled in building houses, were slow on the kind of work involved in the instant contract, some using an unnecessary number of strokes with the saw or using too many nails; vibrator operators bogged down in the concrete, and did not move the machines easily. At the commencement of the project inexperienced firemen on pile-driving crews, not adequately supervised by plaintiff, used too much fuel and failed to keep the fireboxes cleaned out, which resulted in burning out grates. Workmen were inexperienced and slow in laying railroad tracks, and were replaced by more experienced men. There was difficulty in getting mechanics to properly connect the wellpoint system used for dewatering the cofferdams. Some electricians were inefficient in taking apart and putting together motors.

The men whom plaintiff kept and trained were good men and with some training became men of average skill. Plaintiff selected the men it hired and discharged those whom is regarded as unsuitable.

23. Plaintiff also had and used on its project a large number of experienced and skilled heavy construction workmen referred by the N. R. S. office from various points. Plaintiff also had as a part of its organization a large part of its administrative and supervisory organization, including engineers, foremen, mechanics, and other experienced workers in various kinds of heavy construction operations, as well as employees trained in keeping cost records and other related activities. During the progress of the work plaintiff requested and was permitted to select and bring to the project a considerable number of keymen such as carpenters, engineers, machine operators, and foremen. These skilled workers selected by plaintiff were required to register at the local employment office at Winona. A large proportion of the men employed in concrete operations, such as vibrator men, shovelmen, hopper men, and pipe-line men, had previous experience on Lock No. 5, constructed by another contractor, adjacent to Dam No. 5. Likewise a number of pile-driving operators had similar experience on Lock No. 5. There were a number of carpenters on the project, varying from 25 to 100 men, and many of these had previously worked on Lock No. 5, and also on the Hastings Dam elsewhere on the river. Many of the form carpenters were similarly experienced and performed their work in a generally efficient manner. These experienced men were of average skill or better.

On the whole, the work was carried on efficiently, completed within the time limit specified in the contract, and the resulting structure was an excellent one.

24. Many of the workmen whom plaintiff hired from those referred to it by the N. R. S. were not as well qualified for plaintiff's work as the permanent crews of experienced heavy construction workmen such as plaintiff had been used to in its former jobs. Plaintiff should have known that this would be true if the preferences for local labor and the limitation of hours of work which were required by the National Industrial Recovery Act and by plaintiff's contract were to be observed.

There was the usual delay which obtains generally on large construction projects—a lag at the beginning of the opera-

tion, pending the adjustment of unaccustomed crews and foremen to each other, as well as to the work of the respective operations, after which the work proceeded with accelerated speed and efficiency. In the instant case the lag was somewhat emphasized because of some inexperienced workmen and because of poor supervision on plaintiff's part. The extent and amount of this delay is not proved.

25. Plaintiff made oral complaints, practically from the beginning of the work, to both the N. R. S. office and the contracting officer, in regard to being furnished unqualified labor, but did not comply with Article 15 of the contract and Section 21 of the specifications in regard to claims and disputes by making protests in writing or taking appeals.

26. Plaintiff contends, also, that its work was disrupted and costs increased because, if plaintiff discharged a workman, the officers of the N. R. S. made a practice of requiring a hearing of the reasons for the discharge, at which hearing the foreman had to be present.

Workmen wore metal pieces containing a number. It was the practice of labor representatives, upon complaint being made of violation of classification compensation, to take the man's number and to check with the pay roll. Practically each morning during the continuance of the contract, the labor representative would hold a conference with Mr. Tripp, plaintiff's representative, and investigate such complaints, and determine whether or not they were justified.

The occasions when men were stopped during work hours for investigation were mainly those who were reported to be working outside of their classifications. Plaintiff may have suffered some delay and added costs by reason of these practices, but it is not shown to what extent.

27. Paragraph 14 of the specifications provides:

> *Physical Data.*—* * * (b) The locality of the work provided for herein is subject to atmospheric temperatures as low as minus 40° F. and the normal period of ice formation on the surface of the river is from November to April.
>
> * * * * *
>
> (d) Transportation facilities available to the site include the Chicago, Milwaukee, St. Paul and Pacific Railroad immediately at the locks, waterway transportation

from all points on the Inland Waterway System during the Navigation season (April 10 to November 10), and an improved highway in close proximity on the Minnesota side of the river.

(e) The locks are under construction under a previous contract which contemplates their completion in January 1934. * * *

28. The operation of plaintiff's project was from the Wisconsin side of the river. Dam No. 5 was connected on the Wisconsin side of the river with the C. B. & Q. R. R. and State Highway No. 35, by a spur track and an earth-and-gravel road about 2 miles long, both constructed by plaintiff. On the Minnesota side of the river the land sloped sharply down toward the water with State Highway No. 61, which was a concrete highway running parallel to the river, and the C., St. P. and P. R. R. at the base of the hill. There was little, if any, place to park cars near the project on that side of the river. Photographs in evidence as plaintiff's exhibits Nos. 2 and 3 show the situation and are made a part hereof by reference.

Some months prior to beginning of Dam No. 5, the Government had commenced construction of Lock No. 5, on the Minnesota side of the river, and this lock, when connected with plaintiff's Dam No. 5, created a continuous solid walkway across the river at that point. Lock No. 5 was practically completed 4 or 5 months after Dam No. 5 was commenced, although the gates were left open for a time.

Travel to and from Dam No. 5 was mostly by automobile, approaching the dam on the Wisconsin side by plaintiff's earth-and-gravel road. However, there was some travel to the job by boat across the river, and after the lock had been completed, by crossing the lock on foot.

29. Under the provisions of Bulletin No. 51, section 12 (b) and (c), set forth in finding No. 6, the contracting officer, prior to receiving bids and entering into the contract with the plaintiff, had determined that Dam No. 5 was not remote and inaccessible for the work in question; that the project was accessible to labor, and therefore was not a camp job, and that the 30-hour week restrictions would be applicable to the contractor's employees.

At the time plaintiff commenced work on Dam No. 5, it established a camp at the site of the work, adequate to care for 60 to 100 men, which camp was inspected and approved by the Wisconsin State Board of Health. This camp, though it was capable of being enlarged, was not large enough to house and board all the men employed on the job.

Plaintiff's representative on the job, and others of its organization, as well as many of the skilled and unskilled workers, resided either temporarily or permanently in and about Winona, Minnesota, and also on the Wisconsin side of the river in that general section, and commuted between those points and the job. It is not shown that the personnel of plaintiff's organization, or the workmen had any unusual difficulty in getting to and from the job, except on one occasion in April 1934, when there was a heavy flood, referred to in finding 59.

30. For river work of the character of Dam No. 5, the site of the project was accessible to workers on the project, and the decision of the contracting officer in determining that the work should not be conducted as a camp job was reasonable.

Plaintiff did not protest in writing, in accordance with Article 15 of the contract and section 21 of the specifications, the contracting officer's failure or refusal to designate the project as a camp job.

31. Plaintiff had performed prior public contracts under different conditions. Under its previous public contracts practically the only limitation was that employees should not work more than eight hours per day, except in emergencies. There were no restrictions as to the employment and classification of workers.

30-HOUR WEEK

32. Article 11 of the contract provided that "except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual employed on the project shall be permitted to work more than 30 hours in any 1 week."

Article 18 of the contract provided that "all employees * * * shall be paid just and reasonable wages, * * *

sufficient to provide, for the hours of labor as limited, a standard of decency and comfort." The contract further provided that the contractor "shall not pay less than the minimum hourly wage rates for skilled and unskilled labor," as follows: Skilled labor, $1.20; unskilled labor, $0.50; semi-skilled labor, from $0.60 to $1.00.

33. There were occasions during the progress of the work on the instant project when workmen reporting for duty on a certain shift would find that by reason of some emergency or accident they could not begin work until the repairs were completed or the emergency remedied. In such cases men would sometimes remain at the site for awhile and then leave before they were needed. The presence of men in camp at such times, or immediately available when needed, would have permitted greater continuity in carrying on the work. On such occasions plaintiff was delayed and caused additional expense, but the amount thereof was not shown.

There were also occasions when the 30-hour week limit for workmen would be reached an hour or two prior to the completion of a particular operation, and because the men could not continue working for the extra hour or two, plaintiff was handicapped and caused additional expense.

34. Plaintiff paid its employees the minimum wage rate under the contract. The hourly wages paid, especially to common labor, limited by the 30-hour week, was insufficient to justify the men in living in plaintiff's camp and paying for their board and room. Besides, many of them had chores to do which required their living at home. Plaintiff's workmen were, therefore, not available at all times for use in emergencies, and in such instances plaintiff was caused delays and added costs.

35. Upon request of plaintiff, the contracting officer granted exemptions from the 30-hour week provision in a number of instances, as follows:

January 15, 1934, exemption was granted plaintiff as to five carpenters who had worked in excess of the 30-hour limitation. April 16, the contracting officer acknowledged requests of April 7 and 12, regarding men who were in camp, and granted exemption from the limitation of the 30-hour week for 65 men. June 20, the contracting officer complied

with plaintiff's request and granted exemption to the carpentry crew on the dam up to 40 hours per week, limited to 130 hours per month, during the month of June.

On the occasion of a flood, which occurred in April 1934, in order to meet the emergency, plaintiff had kept a number of men in camp. When they had worked their 30-hour week, plaintiff requested permission to work these men longer than the 30-hour week. The contracting officer at first denied the request on the ground that qualified men were available at the Winona office and the contract required that they should be assigned to the work. However, when informed by plaintiff within 24 hours thereafter that qualified men could not be obtained, he granted permission to use the men who were in camp.

April 28, 1934, the contracting officer wrote plaintiff, quoting the following wire from the Chief of Engineers:

> On April Twenty Seven Board of Labor Review rules that operators or operating engineers of cranes comma shovels and similar equipment are not exempt from thirty hour week stop this decision will be put into effect at once except that contractors will be given reasonable time in which to secure additional operators stop in meantime same hourly rate will be paid for all time in excess of thirty hours as is paid for first thirty hours.

Plaintiff replied on May 1, 1934, stating:

> It is our understanding that the N. R. S. will be able to furnish competent operators. We expect that they will furnish them on call at the time requested and we expect such operators as furnished by them to be able to qualify at once. If within first hour or two of operation they show they are not qualified to operate the equipment for which they have been hired, they will be promptly discharged. We do not expect to spend any time training operators with our equipment at $1.20 per hour, as we have not allowed for any expense for such training with our equipment and we understand this is the spirit of the Labor Board's order.
>
> We expect to be calling for additional operators very soon due to an increase in shifts.

May 11, 1934, plaintiff wrote the contracting officer as follows:

> In compliance with your letter of April 28th regarding the withdrawal of exemptions for operators on the

30-hour week, we have hired four additional operators:
* * *

With these additional operators we expect to be able to keep the working hours within the 30-hour week and have notified all operators and foremen to this effect.

We wish to call your attention at this time to one condition where it would be practically impossible to comply with the 30-hour week. We have crews pouring concrete with the mixer plant being fed from a stiffleg derrick. Inasmuch as it is impossible to predetermine the finishing hour of a concrete pour due to unforeseen conditions that may and will arise, such as pumpcrete line clogging, break-downs, while a pour in being made, it would be impossible at times to get another operator to take care of a necessary additional half hour or hour over the operator's 30-hour week in order to avoid running over the time limit for the operator. If such an occasion arises, we feel that we should be entitled to work an operator as we feel that such a condition would be an emergency. We would appreciate an expression from you on this.

The contracting officer on May 15, 1934, advised plaintiff that requests to work operators of its concrete mixers more than 30 hours per week during emergencies could be handled by the resident engineer.

Again on June 15, 1934, plaintiff wrote to the contracting officer stating:

In accordance with our 'phone conversation today in which this company was granted special partial exemption from the provisions of the 30-hour week and enabled to work its carpenter crew for a maximum of 48 hours per week within an 8-hour-day limitation and 130 hours maximum limit for the month of June, we submit herewith a list of employees in our carpenter crew affected by this exemption.

* * * * *

After the completion of two days more of form work, we will not be able to again employ our crew for about two weeks, or until the cofferdam area is in readiness. * * * We would, of course, want to put our old men, who know our work and who are organized to work together, back onto the job upon recommencement of form operations * * *. We are already faced with the serious problem of our men going to other more continuous work on lock jobs, and we expect that a number of our men will have found other jobs by the time we need them again. * * *

While we can and do foresee our requirements and anticipate our work program insofar as we can, and while we could meet a schedule covering a fairly long period, nevertheless it is quite another thing to have to work exactly to schedule when the period is only for part of the work in one cofferdam, or for the period within a 30-hour week, where the time is so short that we have little opportunity to gauge our pace.

We are aware that your action on this special case does not set a precedent, and we take this opportunity of expressing our appreciation for your cooperation in this matter.

A list of 35 carpenters and 15 helpers accompanied the letter.

In replying to that letter on June 20, 1934, the contracting officer stated:

Receipt is acknowledged of your letter of June 15, 1934, confirming your telephone request to work your carpentry crew at Dam No. 5 up to 48 hours per week, limited to a 130-hour month, during the month of June.

Inasmuch as it did not appear practical or feasible for you to employ another crew of carpenters for a few days to complete your form work in the second cofferdam, your request was approved. This letter will serve to confirm this approval, which will extend to the thirty-five carpenters and fifteen carpenter helpers listed in your letter.

36. June 27, 1934, plaintiff, in order to have more workmen available, made an offer to the National Reemployment Service manager to pay a bonus to men to live in camp, which permission was given and some workmen were thus obtained, as shown by letter of the National Reemployment Service dated June 30, 1934, as follows:

With reference to the verbal order given Mr. Gernes while visiting your project this morning for fifty (50) laborers, will say that we have apportioned this order 30 from Wisconsin and 20 from Minnesota. It is our understanding that these men are to stay in camp and will be paid a premium of five and ten cents per hour according to the ability of the men.

The men on the above order should report on the job as follows:

* * * * *

The cards for these men should bear a notation: "Will Stay in Camp."

If the above schedule does not meet with your approval please let us know at once.

37. June 30, 1934, plaintiff wrote the contracting officer as follows:

> If possible, under the new set-up for flexibility in the 30-hour week, we would like to have permission to work on cofferdam 2 forty-eight hours a week, 130 hours a month maximum.
>
> This will enable us to more closely meet with your demand for navigation requirements after July 25th and will be of considerable help to this job during the construction of cofferdam 3.

The contracting officer replied on July 5, 1934, as follows:

> In reply to your letter of June 30 referring to the 130-hour month, please be advised that this matter will be covered by circular letter from this office which will be issued in the very near future.

July 9, 1934, the contracting officer determined that there was not at that time a sufficient amount of labor in the immediate vicinity of Dam No. 5 to conduct the work under the 30-hour-week limitation prescribed in the contract, for the reason that work on all of the lock and dam projects constituting part of the Mississippi River project, was then at peak and many workmen were leaving the immediate area of plaintiff's project to accept work elsewhere.

38. The contracting officer then issued Change Order No. 12, dated July 9, 1934, modifying the 30-hour-week provision of the contract, to permit the 40-hour-week and the 130-hour-month basis to cover until completion of the contract.

Defendant also, when requested, permitted many exemptions from the 130-hour-month order of July 9, 1934. For example, plaintiff was given permission for the following exemptions from the 130-hour month, from July 21 to July 31, 1934:

10 carpenters for 41½ hrs.
2 carpenter helpers for 5½ hrs.
7 mechanics for 60 hrs.
12 handymen for 73 hrs.
14 cranesmen for 320 hrs.
32 piledriver leadsmen, 846 hrs.
7 firemen, 41 hrs.
1 oiler, 3 hrs.
9 laborers, 36½ hrs.

The contracting officer allowed plaintiff exemptions from the 30-hour-week and from the 130-hour-month provision of the contract in many cases where such permission was requested.

Plaintiff suffered delays and added costs by reason of the conditions set forth in above findings 32–38, inclusive. However, plaintiff was aware of the 30-hour-week provision in the contract before entering its bid. If it desired workmen to live in camp plaintiff had the privilege of paying them such wages as would induce them to live there, instead of the minimum wage permissible under the contract.

NUMBER OF HELPERS TO JOURNEYMEN

39. Article 18 and Addendum No. 3 to the contract prescribed the wages to be paid for skilled, semiskilled and common labor, and paragraph (d) thereof provided as follows:

> The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

December 16, 1933, about a month after the work started, the contracting officer asked plaintiff's project engineer for an expression of opinion concerning a proper ratio of helpers to journeymen in any trade employed on the work. Plaintiff's project manager advised: "There should never be established any fixed rule as to the proportion of helpers to skilled men."

During the early part of 1934 the Board of Labor Review of the Federal Emergency Administration of Public Works and also the War Department received complaints from workers on Federal Emergency Administration projects in different parts of the country, indicating that the P. W. A. regulations relating to the classification of workers were being violated; that skilled workers were being classified and paid at semiskilled rates.

40. Plaintiff contends that the defendant from the beginning of the work refused to permit it to employ a greater ratio of helpers to journeymen than 1 to 1.

In June 1934, the area engineer caused an investigation to be made of the proportion of helpers to electricians, and on June 25, 1934, he instructed the resident engineer in charge of plaintiff's project as follows:

> However, it should be noted that in every case electrician helpers must work with and serve skilled electricians in order to properly conform with Article 18 (d) of the contract.

In July 1934, the area engineer again wrote that the number of electrician helpers employed by plaintiff was excessive, to which the resident engineer replied that plaintiff did not require assistant electricans to do any skilled electrical work without the supervision of the electrical foreman or the electrician.

41. Plaintiff had, prior to the instant contract, been accustomed to using more than one helper to a journeyman. This question was the subject of contention between the contracting officer and plaintiff, on the instant job.

42. August 20, 1934, the contracting officer issued the following directions to resident engineers and contractors:

DIST. ENGINEER FORM NO. 1 (PWA) 8/20/34

Insert in Section III

> 21. The following ruling published by the Chief of Engineers in Circular Letter (Finance No. 189) dated August 16, 1934, will govern in the employment of helpers on all P. W. A. projects:
>
> "1. The following rules, conforming to the policies of the Board of Labor Review, will be applied to the use of helpers on existing and future P. W. A. contracts:
>
> (a) The total number of helpers of any craft employed by a contractor shall not exceed the number of journeymen or skilled workers employed in that craft.
>
> (b) The number of helpers on any part of the work will not be limited, but no helper will be allowed to work except under the direction of a journeyman. There is no objection to the use of simple tools by bona fide helpers provided they do not work independently of journeymen. Helpers will not be required to provide their own tools.
>
> (c) In arriving at the number of journeymen employed, working foremen of the craft (foremen who use

tools and whose hours of work are limited) may be classed as journeymen.

(d) In cases where the contractor claims that the allowance of helpers should be more liberal, he will be given the opportunity to appeal to the Board of Labor Review and the enforcement of the prescribed ratio will be held in abeyance pending a decision. If the decision is adverse he will be required to make up the difference in pay for the elapsed period.

2. For the skilled trades, semiskilled classifications such as rough carpenter, form builder, saw and hatchet man, rough painter, etc., will not be allowed. There is no objection to the semiskilled classification of form setter where the men do not use carpenters' tools.

3. In the future, men requisitioned and certified from the National Reemployment Service as skilled craftsmen will not be employed as semiskilled workmen unless recertified as such."

September 15, 1934, plaintiff wrote the following to the contracting officer:

> Replying to your form letter dated August 20th covering Paragraph 21, Section III of Engineer Form PWA No. 1.
>
> Under the terms of our contract with you for the construction of Dam No. 5, we can find no clause giving you the authority to limit the number of helpers in any trade to the same number as skilled men in the same trade.
>
> In our particular case no present hardship will be worked upon us, but should there arise a condition where this ruling would work a hardship on us, we would expect to be paid the additional costs incurred.

Plaintiff protested the order of August 20, 1934, to the contracting officer in the foregoing letter, but did not appeal from this ruling to the head of the department within 30 days.

43. In a letter dated October 3, 1934, the contracting officer informed plaintiff that the rules relating to the limitation of helpers promulgated on August 20, 1934, were not intended as changes or additions to the contract but only as administrative interpretations thereof; that the ruling was published by the Chief of Engineers and the contracting officer and conformed to the policies of the Board of Labor Review. He also advised plaintiff that if it wished to continue its protest

to the ruling it might appeal to the Chief of Engineers; also that the ruling itself specified that a contractor, if it so desired, might appeal to the Board of Labor Review for a more favorable allowance respecting the number of helpers.

44. Upon receipt of the ruling of August 20, 1934, plaintiff rearranged some of its gangs of workmen, in such cases as they needed to be reformed so as to conform to the ruling. Under plaintiff's prior custom and practice a pipe fitter and two helpers comprised a gang. Under the ruling of August 20, if a helper was dropped the work could not go forward. Hence another pipe fitter, whom plaintiff believed unnecessary to carry on the work, was added at $1.20 per hour, which increased plaintiff's costs.

Plaintiff's practice and custom on previous contracts was to use a labor foreman for all the labor handling materials, such as pipe and nails. However, on the instant contract, both prior and subsequent to August 20, 1934, if a carpenter shop had borrowed two men for a long time, they became employees of the carpenter shop and plaintiff paid them as helpers instead of laborers. In order to prevent this, plaintiff broke up the labor into separate gangs with a foreman for each gang, which added to plaintiff's costs. It is not proved to what extent plaintiff rearranged its workmen into different gangs, nor the additional expense resulting from so doing.

On the instant contract the number of skilled carpenters employed by plaintiff practically always greatly exceeded the number of carpenter's helpers. In February 1934, plaintiff had 54 carpenters and 17 carpenter helpers on its pay roll. In June 1934, the pay roll showed 42 carpenters and 17 helpers. In August 1934, when concrete operations were approximately 54% completed, plaintiff employed 55 carpenters and 3 helpers. In September 1934, plaintiff employed 109 carpenters and 44 helpers; in November 1934, 75 carpenters and 4 helpers.

45. The extent to which plaintiff reorganized its working force in order to comply with the ruling of August 20, 1934, is not proved. Plaintiff's letter of September 15, 1934, advised the contracting officer that no present hardship would be worked upon plaintiff, but that it would expect to be

paid additional costs incurred in the event that a condition should arise which would be a handicap by reason of the ruling. The application of the "1 to 1 rule" caused plaintiff some additional expense, the amount of which plaintiff did not prove.

The promulgation by the defendant of the "1 to 1 rule" was a reasonable means of securing compliance with the provisions of this and other similar contracts relating to wage rates and classification of employees.

46. October 23, 1934, the contracting officer wrote plaintiff as follows:

> Reference is made to your letter of September 15th, regarding the established proportion of helpers to skilled mechanics, and my reply thereto, dated October 3d, 1934.
>
> For your information and guidance, I quote the following paragraphs from a recent letter of the Chief of Engineers, on this subject:
>
> "1. Circular letter (Finance No. 189) of August 16, 1934, states that the ruling will not be enforced if the contractor desires to appeal to the agency provided in the contract for the purpose of hearing such appeals. If he accepts the ruling without making an appeal, he will, in the opinion of this office, have no grounds for a claim on account of increased cost.
>
> 2. A letter of protest to the District Engineer is not the proper procedure. The appeal should be addressed to the Board of Labor Review and should be accompanied by all supporting data which the contractor desires to submit."

47. October 26, 1934, plaintiff wrote the following letter to the Board of Labor Review at Washington, D. C.:

> Under date of October 23d, we are advised by Major Dwight F. Johns of St. Paul to file a letter with your Board protesting the ruling issued by you through the Chief of Engineers setting the established proportion of helpers to skilled mechanics, which ruling was dated August 20, 1934.
>
> Inasmuch as the 16 contractors on the upper Mississippi River are variously affected by this ruling, and in order to conserve your time, as well as that of the contractors, it has been decided that a committee from these contractors will present their case supported by all of the necessary data. The committee has in the course of

preparation this necessary data, and would ask that the presentation of such data be put off until a hearing is granted.

In the meantime, we wish this letter to act as a stay against our acceptance of the ruling without further hearing before you.

November 3, 1934, the Board in reply advised plaintiff that a hearing would be held in Washington, D. C., on November 15, 1934, and requested it to submit the following material:

(1) Detailed information by crafts on the character of the work which is being done and, if you propose to argue that certain men whom you wish to class as helpers are not doing the work of skilled mechanics, detailed information which will show that there is a difference between the work done by the men at different rates of wages.

(2) Sufficiently adequate transcripts of your pay rolls to show by crafts the number of helpers and the number of skilled mechanics in each of the crafts at various stages of the work.

(3) Information on practices in the kind of construction with which your contractors are concerned which is now under way in this area, not financed from Public Works funds, if there is such construction, and information on similar construction before P. W. A. The point here is, of course, that while the Public Works regulations clearly require the payment of certain minima, these regulations must be interpreted and applied to particular projects. For this interpretation and application, information as to past labor rates is somewhat pertinent.

I suggest that you send me as soon as possible a summary of the material which you plan to present at the hearing.

48. November 12, 1934, plaintiff telegraphed the Board requesting a 60-day postponement of the hearing due to the lack of time to prepare the data requested by the Board. November 13 the Board telegraphed plaintiff that the hearing had been postponed to the week of November 26, that plaintiff would be notified respecting the exact date, and that a longer postponement was inadvisable inasmuch as the challenged rule was not being complied with pending the Board's decision. November 16, plaintiff telegraphed

the Board renewing its request that the hearing be postponed for 60 days and advised that the ruling was being complied with. November 19, 1934, the Board wrote plaintiff that its request had been granted and the case removed from the Board's calendar, and that a hearing would not be scheduled until a further request for a hearing was received. On the same day the Board wrote to the Chief of Engineers, War Department, advising him that the case had been removed from the Board's calendar and that it would depend upon him to see that the order was enforced pending any action by the Board.

49. November 26, 1934, plaintiff addressed the following letter to the contracting officer:

> Inasmuch as we have tried to conform in every respect to the rulings of the Labor Board against the admittedly impracticable costly results of such rulings, we will continue our policy by paying the inadvertent excess in relation to certain electrical helpers and journeymen covered by your letter to Mr. Funk, dated November 23, 1934.
>
> In so doing, however, we maintain the position that all of the payments that we have made voluntarily or involuntarily have been made under protest, and will continue to be so made.
>
> As you no doubt know, the river contractors are preparing data to show the unwisdom of the ruling promulgated August 16th in its effect upon the Government, the Public, and the Contractors unhappily involved. The hearing was scheduled for November 15th, but on account of the conflict of bidding dates a request for sixty days' extension was granted.
>
> At the hearing we are specifically attempting to prove to the Labor Board (1) that the classifications having to be employed upon certain types of work are excessive and not customary, and (2) we are preparing to support this contention with transcripts of our pay rolls to show by crafts the number of helpers and the number of skilled mechanics in each of the crafts at various stages of the work, and (3) supplying information on practices in the heavy construction industry which was usual prior to P. W. A.
>
> The point, to quote Mr. Patterson H. French, Secretary of the Board of Labor Review, "is, of course, that while the Public Works regulations clearly require the

payment of certain minima, these regulations must be interpreted and applied to particular projects. For this interpretation and application, information as to past labor rates is sometimes pertinent."

November 28, 1934, the contracting officer wrote a letter to plaintiff stating:

> The following paragraphs from the Chief of Engineers' letter of November 20, 1934, are quoted for your information and guidance:
>
> "1. Reference is made to paragraph 1 (d) of Circular Letter (Finance No. 189) of August, 1934, in which the enforcement of rules regarding helpers is suspended where contractors desire to appeal to the Board of Labor Review.
>
> "2. The contractors on the Upper Mississippi River, who indicated a desire to appeal, have been given full opportunity to be heard by the Board of Labor Review, but have failed to appear and have requested a long delay in the hearing of the case. In view of the fact that they have not chosen to prosecute their appeal at this time, the enforcement of the rules concerning helpers will not be further postponed by the Department.
>
> "3. The above instruction is issued at the request of the Board of Labor Review. As a matter of fact, it is understood that practically all, if not all, contractors are now observing the requirements of the Circular Letter."

50. Early in June 1935, the attorney for Nolan Brothers, who had a contract for a river project and who also purported to speak in behalf of a committee of contractors engaged in the construction of certain upper Mississippi projects, conferred with the secretary of the Board concerning the prospect of a hearing on the "1 to 1 rule" as it applied to those contractors. He was advised by the secretary that the Board was then in the West and that an informal meeting or conference with the contractors might be arranged in St. Paul.

June 24, 1935, the secretary of the Board wired counsel representing the contractors as follows:

> Board of Labor Review meets Saint Paul Friday morning this week and Washington July ten stop Advise which meeting contractors prefer to attend stop

I will advise later place of Saint Paul meeting, probably office of P. W. A. Regional Engineer.

June 25, counsel telegraphed the Secretary of the Board:

> Board meeting of contractors Chicago June twelve they agreed to attend St. Paul meeting and local contractors reached this morning still prefer St. Paul stop Advise whether St. Paul meeting definite so that I may wire all contractors.

June 26, 1935, the Secretary of the Board wired Attorney Cronin:

> Your yesterday's telegram just received stop Board will meet ten a. m. Friday at office of J. W. Patton Regional Engineer Inspector uptown Post Office and Federal Building Saint Paul.

The Board met at the time and place indicated, there being present Mr. Lindsay Rogers, Chairman, presiding, and Mr. E. J. Russell and Mr. J. A. Wilson, Members of the Board, and Mr. William T. Evans, Secretary to the Chairman. The title of the minutes is as follows:

> The informal hearing before the Board of Labor Review of the Federal Emergency Administration of Public Works relating to the above subject convened in the Federal Building, St. Paul, Minnesota, at 10 A. M.

The subject was "limitation of helpers"—various projects on the Mississippi River, Docket No. 239, St. Paul, Minnesota, June 28, 1935.

51. The meeting held by the board was informal and was not an official meeting. Official notices of the hearing had not been sent out. The War Department had not been advised to have a representative present. Labor was not represented, nor were there stenographers present to take the official proceedings. Neither plaintiff nor defendant presented sworn testimony or data concerning the alleged 1-to-1 rule.

The only record of the proceedings was that which is termed an "aide-memoire" kept by William T. Evans, Secretary to the Chairman, and which minutes were not used officially by the board. However, this aide-memoire shows that Mr. Cronin, attorney for Nolan Brothers, and purportedly speaking for the contractors having contracts on the

upper Mississippi River, made a statement setting forth the contentions of the contractors. Informal discussion was had.

The chairman stated, as shown by this aide-memoire, that the board would be willing to have the contractors present in writing anything they desired to present, to make any petition to the board which they desired to make. The matter of procedure for making up the petition was discussed. Then the chairman stated this was a very informal hearing and that the contractors could have a public hearing if they desired, and would be given an opportunity to present in writing anything they desired.

52. August 1, 1935, the Secretary of the Board wrote Mr. Cronin as follows:

> This is in reference to the question of the limitation of helpers on various projects on the Mississippi River.
> If you will recall, Mr. Rogers, at the conclusion of the informal hearing which was held in St. Paul on June 28, suggested that you might present this question to us in the form of a written petition. To date we have had nothing from you in this connection. Unless we hear further from you, no action will be taken by us.

53. Plaintiff did not demand any further hearing and did not present any petition or any data to the Board, and thereby abandoned its appeal.

54. Throughout the period of the work on the contract the relations between the contracting officer and plaintiff's organization, and between the N. R. S. and plaintiff's organization, were cordial and friendly. Both the contracting officer and N. R. S. cooperated with plaintiff in carrying on the work of the project.

FLOOD DAMAGE

55. The general specifications provided in part as follows:

> 14 (c) The stages of water and the frequency and duration of floods which may be expected are indicated on sheet 14/1.1.
>
> * * * * *
>
> 6 (c) Should the cofferdam, when constructed to the heights specified and in accordance with Section I, be overtopped by high water, an amount of time, equal to

that lost by such flooding, will be allowed in addition to the time agreed upon above for completion; provided it is clearly established that such lost time is not due to any negligence on the part of the contractor. (See hydraulic data on sheet 14/1.1.)

Section 10 (a) of the general specifications, under the caption "Flooding of cofferdam—" provided that the contractor should be allowed $1,500 for the flooding of the cofferdam during the progress of the work in case the river overtopped the cofferdam "where built and maintained to the full heights specified in par. 1–02."

Paragraph 1–02 of the Detail Specifications, provided that the cofferdam should be "constructed with the top at an elevation not lower than 657.0 M. S. L., * * *."

At the site of Dam 5 on the Wisconsin side of the Mississippi River there is a flood plain which extends about 2 miles from the river to the foot of the bluffs. The flood plain is cut by several sloughs, the largest of which is called Indian Creek. Plaintiff built a spur track which extended across the plain to connect the site of Dam 5 with the main line of the Chicago, Burlington & Quincy Railroad which ran along the foot of the bluffs. Before submitting its bid, plaintiff was furnished with the hydrographic data referred to in paragraph 14 (c) of the specifications, which data showed the water stages and frequency and duration of floods which might be expected during the progress of the work. Surveying operations for the spur track began on October 9, 1933, and grading work on October 13, 1933. A portion of the spur track was below the flood stages indicated on the hydrographs made a part of the specifications. The embankment for the track was made with a drag line, borrowing materials from both sides of the fill. The banks were protected from rain and erosion by strips of saplings laid on them. Four 30″ culverts were placed by plaintiff in the railroad fill to equalize the water in the slough and to permit the passage of flood waters.

56. Plaintiff had notice that floods might occur which would overflow a part of the spur track as constructed by it. Floods that high had occurred 14 times since 1910. The plan or method of constructing the spur track was not

approved by the defendant. An alignment plan of the spur track was submitted to, but it is not shown that it was approved by, the contracting officer. He notified plaintiff that the track was too low, and did not have sufficient openings through the embankment to carry off prospective flood flows. Plaintiff informed the contracting officer that it would breach the embankment if that was required. Plaintiff was aware that if it did not breach the embankment, when a flood came suddenly upon it, the embankment would be overflowed and in danger of being washed out.

57. During stages below flood stages, the waters of the Mississippi River, which normally would have passed through Indian Creek, were confined to the main channels of the river by a permanent low brush and rock dam at the upper opening of the creek into the river, which opening was about 1½ miles upstream from the site of Dam 5. This dam had been there for many years. Its top was a foot or two below the natural elevation of the ground. Its purpose was to improve the navigability of the river by confining the waters to the main channels thereof during ordinary stages of water. It was not high enough to prevent flood flows from entering Indian Creek. Indian Creek had another opening into the river somewhere below the site of Dam 5 so that in time of flood water entered it at both openings. The creek is crooked, grown up with trees and brush, and normally has little if any current.

58. September 16, 1933, which was 10 days prior to opening bids for Dam No. 5, the defendant advertised for bids to construct a nonoverflow earth dike designated as Dike No. 5, which formed a part of the Dam 5 project. The dike contract was awarded to the LaCrosse Dredging Company.

Work on Dam 5 and Dike 5 began at about the same time and the two jobs went forward simultaneously. The dike extended upstream from the abutment of the dam a distance of about 3.5 miles paralleling the river to high ground on the Wisconsin shore. Plaintiff constructed about 300 feet of the earth dike as a part of the work under its contract for the construction of the dam.

The dam and the dike formed related parts of the same construction project. Plaintiff at all times had general

knowledge of conditions affecting the construction of the dike and the spoil banks along the dike were visible for a long distance from Dam 5. When completed the earth dike was intended to prevent floodwaters from passing over the location of the spur track but plaintiff knew that the completion of the dike was not expected before the completion of the dam.

A pictorial view and plan showing the location of river, dam, dike, and surrounding area is in evidence as defendant's exhibit No. 17, inclosure 233, page 291, and is made a part hereof by reference.

There was considerable mucky material in the bed of Indian Creek which had to be removed in order to place the earth dike upon a stable foundation. November 13, 1933, the dike contractor requested permission to break through the rock and brush dam at the mouth of the creek and pump out the soft material with a suction dredge. The contracting officer gave his permission on November 22, 1933, but required the dike contractor to replace the original brush and rock dam with a temporary earth dam at a location where it would not interfere with operations in constructing the earth dike. It is not shown that plaintiff had notice or knowledge that the contracting officer had given permission for breaching the rock and brush dam.

The rock and brush dam was about 300 feet long and its elevation was 650. The dike contractor made a breach in the dam about 40 or 50 feet wide and, as he had been directed to do, built a temporary earth dam, made of stripping and topsoil.

59. There was a heavy snowfall in the area on March 29 and 30, 1934, followed by general rains on April 1 and 2. The waters of the river rose rapidly and on April 3 had reached an elevation of about 650, and on that date would have overtopped the rock and brush dam, if it had been there. The rise continued, and on April 5, plaintiff flooded the cofferdams to minimize damage to the work. The flood had then reached an elevation of 655.5. The spur track was surrounded by water.

Plaintiff took no action to breach its track embankment. The flood continued to rise, reaching its maximum height

656.6, during the night of April 5–6. The elevation of the top of the rails of plaintiff's spur track was approximately 654.8. Some 4,365 feet of plaintiff's spur track was overtopped by the flood. During the night of April 5–6 the temporary earth dam at the mouth of Indian Creek washed out under pressure of the high water, and a portion of plaintiff's spur-track fill also washed out. The parts of the rock and brush dam which had been left when that dam was breached by the dike contractor remained in place.

60. Dike 5 was completed before the Spring of 1935, and shut off flood flows down Indian Creek during the Spring freshets in that year.

61. April 7, 1934, plaintiff wrote the contracting officer, informing him that plaintiff had flooded the cofferdams on April 5, in anticipation of the flood water overtopping them, and requesting an extension of time for the time lost beginning with the snowstorm on March 30. Plaintiff at that time made no claim for damage to the spur track or embankment.

April 18, 1934, the contracting officer found as a fact that the delay suffered by plaintiff was not due to unforeseeable causes specified in Article 9 of the contract and denied plaintiff's request for an extension of time. He also stated:

> The maximum river stage attained at the site of your work occurred on April 6, and was 656.0 M. S. L., which elevation is 1.0 foot below that required under paragraph 1–02 of the specifications for height of the cofferdam. I find that this height was exceeded, about the same time of the year, in 1922, 1928, 1929, and 1932, and that the heights reached in 1923 and 1927 were about the same as that reached this year. This information is shown on the hydrographs furnished you in the plans for Dam No. 5.

Plaintiff wrote to the contracting officer on May 7, 1934, requesting a reconsideration of the decision of April 18, 1934, and presenting a claim for an estimated amount of $18,000 on account of damages caused by the flood, as well as a time extension of 20 days. In support of its claim plaintiff asserted that the flood damage on April 6 was due to the fact that the dikes which the Government had built "across the upstream intake of Indian Creek and other openings had been overtopped, allowing at least 7,500 feet

of water to be precipitated against the railroad serving the job." Plaintiff further asserted:

> In addition to the narrowing of the waterways by the construction of the dikes above mentioned, the auxiliary lock gate was closed and remained closed during the entire flood. This lock gate would have passed approximately 10,000 second-feet at this time and would have probably cared for the 7,500 second-feet which was prevented from coming down the sloughs by the construction of the dikes.
>
> The fact that the river channel was materially narrowed by the construction of these dikes and water thus prevented from coming down the sloughs, coupled with the keeping of the auxiliary gate closed, creating a higher water condition in the dam and also caused the washing out of the railroad hereinbefore referred to.

June 2, 1934, the contracting officer wrote plaintiff that he had thoroughly investigated conditions and found as a fact that the maximum river stage reached could not be considered as unforeseeable within the meaning of article 9 of the contract and adhered to his previous finding denying an extension of time. He further found as a fact "that the damages and delays you suffered in this instance were caused solely by the hazard you elected to assume as to possible weather and water conditions." He wrote:

> Answering your contentions specifically, it is concluded:
>
> (1) That the railroad fill was constructed with inadequate openings prior to the time any dike across the slough was contemplated. Even had no dikes been built, breaching of the railroad fill would have been necessary and a general washout of the railroad would not have been avoided as at least one-half of the railroad fill would have been overtopped. It is estimated that elevation 655.5 M. S. L. would have been reached at the junction of the railroad spur and Indian Creek, even had no railroad fill been made.
>
> (2) Had the auxiliary lock gates been open, the resulting effect on the water surface at the entrance to Indian Creek would have been negligible and thus the decrease in flow to the railroad fill negligible.
>
> (3) Your letter of April 7, 1934, sets forth the fact that you had at least one week's notice of the impending rise of the river, and made no effort to guard the railroad

fill against damage from river stages reasonably to be expected.

(4) It is reasonable to assume that the damage and delay you suffered would have been the same as a result of breaching of the railroad fill and partial submergence, and breaching would have been necessary as the openings you left in the railroad fill were inadequate.

(5) The facts of record and as discussed above clearly show that you, in this case, did involve a loss of time and property. However, all of the delay and damage was due to your having presupposed that a river elevation of 657.0 M. S. L. would not be reached or even approached, and your work was based thereon; that you also discarded data furnished under the specifications and relied upon your own resourcefulness.

I, therefore, find that such delay and damage suffered is not excusable under the terms of the contract.

You are advised that you may appeal from these findings to the Chief of Engineers within thirty days, as provided in your contract.

This decision of the contracting officer was affirmed on appeal by the Secretary of War on December 13, 1935.

62. At the time of the flood the lock gates were not equipped with operating machinery and the lock floor had not been paved. Plaintiff did not request the defendant to open the lock gates and the defendant did not open them. Because of their uncompleted condition, opening the gates during the crest of the flood would have resulted in scouring of the lock floor and endangering the structure.

63. Plaintiff has not proved that the damage to plaintiff's dam was caused by the fact that the rock and brush dam had been breached or the fact that the temporary earth dam washed out.

64. Following a conference with defendant's engineers, plaintiff agreed that its fair and reasonable cost resulting from the action of the flood upon its spur track embankment was $11,764.18.

EXCESS CEMENT REQUIRED

65. The specifications relating to concrete provided in part as follows:

5–01. *Composition.*—Concrete shall be composed of cement, fine aggregate, coarse aggregate, and water so

proportioned and mixed as to produce a plastic, workable mixture in accordance with all requirements under this section and suitable to the specific conditions of placement.

5–02. *Classification.*—

(a) *Designation.*—Concrete is designated for the various parts of the work as classes "A" and "B," in accordance with the conditions of application and the proportions of materials and strengths required. * * *

* * * * *

Class "B" shall be used for mass sections, thick footing courses and retaining walls, and girders, columns, and other members of large dimensions.

In all cases the class of concrete used in each part of the work shall be as specified or indicated on the plans or as directed by the contracting officer.

5–06. *Fine aggregate.*— * * *

(2) Fine aggregate conforming to the above gradation except for deficiency in percentage of material passing the #50 sieve may be accepted, provided, such deficiency be not more than 5 percent and be remedied by the contractor by the addition of pozzuolanic or cementitious materials as specified in par. 5–09 in sufficient quantity to produce the required workability as approved by the contracting officer.

* * * * *

5–09. *Material added for workability.*—(a) Any pozzuolanic or cementitious material used to improve workability (see par. 5–06 (c) (2)), shall be subject to the approval of the contracting officer. * * *

5–13. *Proportioning.*—(a) *Basis.*—All concrete materials will be proportioned so as to produce a workable mixture in which the water content will not exceed the maximum specified.

(b) *Control.*—The exact proportions of all materials entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all materials entering into the concrete. The proportions will be changed whenever in the opinion of the contracting officer such change becomes necessary to obtain the specified strength and the desired density, uniformity, and workability, and the contractor will not be compensated because of such changes.

* * * * *

(d) *Cement content.*—Each cubic yard of concrete shall contain the following minimum volume of cement:

Class "A"------------------------------ 5.5 bags.
Class "B"------------------------------ 4.5 bags.

(e) *Water content.*—(1) In calculating the volume of water in any mix, the free moisture contained in the aggregate will be included in the total water content. The total water content per bag of cement for each batch of concrete shall not exceed the following:

Class "A"-------------------------- 5.5 gallons.
Class "B"-------------------------- 6.5 gallons.

* * * * *

5-14. *Mixing and placing.*— * * *

(c) *Conveying.*—Concrete shall be conveyed from mixer to forms as rapidly as practicable by methods which will prevent segregation or loss of ingredients. * * *

5-16. *Finishing.*—Green concrete shall be properly forked back along the faces of all forms by use of standard concrete forks or spades. The finished surfaces shall be free from voids and the plastering over of such surfaces will not be permitted. Defective concrete will be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, or anchors to attach it securely to the other work. This concrete will be drier than the usual mixture and shall be thoroughly tamped in place. Unless otherwise specified, all top surfaces of concrete shall have a board float finish without mortar, and shall be true to elevations as shown on drawings. Where considered necessary by the contracting officer, or where indicated on the drawings, joints shall be carefully made with a jointing tool. Every precaution shall be taken by the contractor to preserve finished surfaces from stains or abrasions. * * *

66. April 10, 1934, the contracting officer wrote plaintiff as follows:

I find the concrete being placed under your Contract No. W923eng654 lacking, in my opinion, the desired uniformity of surface texture.

Some corrective measure will be necessary. It is possible that this can be accomplished by some modification in your aggregate grading, particularly the fine aggregate, which I note is running short in the percentage of

material passing the No. 50 sieve, either by a change in the fine aggregate, or by the action contemplated by paragraph 5–06 (c) (2) of the specifications.

This nonuniformity in surface texture is an indication of lack of completely adequate workability, and unless this can be obtained by a change in aggregate or in its gradation it will be necessary to require the use of more cement, under provision of paragraph 5–13 (b).

I shall be glad to have Mr. Hill take up this matter with you with a view to arriving at a satisfactory answer.

May 18, 1934, plaintiff wrote the contracting officer that sand, gravel, and all material had passed Government inspection before being received on the job; that paragraphs 5–03, 5–13 (a), and 5–13 (f) of the specifications were written to produce a concrete that was workable and of a definite strength but that there was nothing in the specifications as to the quality of surface texture; that the test cylinders showed that the strength of the concrete exceeded specification requirements and that plaintiff would expect payment for cement added to improve surface texture of the concrete.

Under date of June 4, 1934, the contracting officer replied that he considered that he was authorized by the specifications to require additional cement in order to secure uniformity, and that no extra payment would be made to plaintiff for added cement.

67. Plaintiff appealed from the decision of the contracting officer to the Chief of Engineers, who made a finding under date of November 21, 1934, containing the following language:

There is no specific requirement in the specifications for any particular surface texture for the concrete. Surface texture is not necessarily an index of density, uniformity, or workability inasmuch as these may be individually satisfactory in concrete having an unsatisfactory surface texture. In view of the fact that the materials entering into the mixture, as well as the resulting concrete, adequately met the specified requirements, it is believed from the information at hand that an equitable adjustment should be made under the contract covering the excess quantity of cement ordered by the contracting officer for the purpose of producing the desired surface texture.

December 14, 1934, the contracting officer again wrote to the Chief of Engineers, as follows:

> 2. It will be noted that the addition of approximately 2945 sacks was required by the Government prior to July 7 for the purpose of improving the uniformity, workability, and density of the concrete. This is the total quantity added for this purpose. During the same period the contractor requested the addition of a total of at least 729 sacks over that required by the Government to increase the workability of the concrete to that necessary for placement methods in use. The aggregate in use had a maximum size of 1½ inches. The use of a new blended sand was begun on June 15. Although the workability was satisfactory, the low strengths of test cylinders caused the Government to require the addition of cement between July 7 and August 26, on which date the combination of aggregates in use first produced a concrete which conformed to the specification requirements without the addition of cement. It is estimated that of the total 2058 sacks added between July 7 and August 26, there were added, at the direction of the contracting officer, approximately 979 sacks to attain design strength.
>
> 3. At the time of my original letter of instructions to the contractor, the concrete being placed at Dam No. 5 was noticeably below the standards set by the specifications. The honeycombing, sand streaking, and other surface blemishes which were in evidence indicated that the concrete lacked the qualities which would permit placement with reasonable assurance of satisfactory concrete either at the surface or in the interior of the mass. The surface texture attained was considered a manifestation of a deficiency in the concrete which materially affected the qualities of density, uniformity, and workability. Since, in my opinion, the concrete did not have the "desired density, uniformity, and workability," the contractor was instructed to take corrective measures. The contractor's efforts to improve the grading of aggregates were delayed or unsuccessful for a time, and the addition of cement was the alternative.
>
> 4. The extra cement raised the quality of the concrete to the *required* standards, but, other than this, added nothing which could be considered to the advantage of the United States. In my opinion, concrete of the specified quality could have been produced using the minimum cement. Changes in aggregates have since been made which are satisfactory to me. The specification requirements as to density, uniformity, and workability

are not sharply defined, and the application is of necessity dependent upon the inspection standards of the district. The standards exacted by me were not excessive, and the quality of concrete to be attained was commensurate with that of other concrete in the district in which excess cement was not added.

5. In cases similar to this, where the contractor is negligent in eliminating defects in his work or materials, the contracting officer has no option but must specify alternative corrective measures. The desire to avoid additional cost, such as the use of extra cement, may serve to compel the contractor to study the causes of defects and to correct them.

6. After careful reconsideration of my previous action, I again recommend that the claim of the contractor be disallowed.

January 15, 1935, the Chief of Engineers denied plaintiff's claim.

68. The materials composing the aggregates had all passed Government inspection. The proportions of material entering into the concrete mixture were determined and passed upon by the defendant's engineer and inspectors, and the concrete was approved by them. The concrete was transmitted through a pumpcrete machine, which is difficult to do if the mixture is not workable, was mechanically vibrated by electric vibrators to insure thorough vibration, and was placed under direct supervision and approval of defendant's engineer and inspectors, in accordance with the specifications. According to the cylinder tests the concrete met or exceeded the specifications in strength. No question was raised by the contracting officer concerning the strength of the concrete prior to April 10, 1934. From time to time plaintiff had requested and received permission to use additional cement in order to obtain a more workable concrete, and for greater ease in pouring.

69. The density, workability, or strength of concrete cannot be accurately determined merely by observing its surface texture, but surface texture may give some indication to an experienced observer of the degree to which one or more of these other qualities are present. There is no evidence that the contracting officer, when he ordered plaintiff to add cement to the mixture, did not think, as he stated in his letter

of April 10, 1934, that "This nonuniformity in surface texture is an indication of lack of completely adequate workability * * *" or that his order was not given in good faith.

70. The parties agree that the amount of excess cement furnished to comply with the contracting officer's letters of April 10, 1934, and June 4, 1934, was 736¼ bbls., and that the reasonable value thereof was $1,811.91.

71. June 28, 1935, plaintiff presented its claim for added costs to the contracting officer, which claim was denied in a letter of the contracting officer to plaintiff on July 27, 1935. Plaintiff in its letter to the contracting officer dated August 13, 1935, appealed from the contracting officer's findings, to the Chief of Engineers, and plaintiff's appeal with accompanying data in support thereof was submitted to the Chief of Engineers August 23, 1935. These documents are in evidence as defendant's exhibit No. 13, pages 1, 8, 12, and 13, and defendant's exhibit No. 17, pages 75, 79, and 80, and defendant's exhibit 14, pages 1–9.

The division Engineer and the Chief of Engineers received and considered plaintiff's appeal and the appeal was denied.

72. Plaintiff itemized its claims against the defendant as follows:

1. Claim for flood damage to railroad April 1934	$18, 800. 00
2. Extra cement ordered by Contracting Officer for surface structure	3, 883. 00
3. Payment for Class "A" concrete in baffles and energy breakers	6, 400. 00
4. Changed conditions of the foundation sands by reason of log and slab obstruction	12, 500. 00
5. Refusal of Contracting Officer to pay for fill material replacing material scoured out by the river action below concrete grades	3, 027. 00
6. Deduction made by the Contracting Officer from pay quantities under Change Order No. 5	1, 737. 00
7. Extra costs for constructing Sill 6–A of the roller gate section	2, 400. 00
8. (a) Covering N. R. S. Costs, untrained men. (b) Extra costs for 30-hour week. (c) Extra costs due to orders purporting to come from the labor board. (d) Extra Costs due to Contracting Officer's refusal to grant camp conditions. Total of Claim #8	214, 974. 00
Total all claims	263, 721. 00

Subsequently Items 3, 4, 6, and 7 were eliminated by plaintiff, and it reduced the amount of the remaining claims, except Fill under sills, as follows:

1. Claims asserted under the special Jurisdictional Act	$154, 224. 30
2. Claims asserted under the Court's general jurisdiction:	
(a) Flood damage	11, 764. 18
(b) Fill under sills	3, 027. 00
(c) Excess cement required	1, 811. 91

(b). The claim for fill under sills was abandoned by plaintiff.

Plaintiff's books and records were examined by the defendant's auditor and some differences were found. Plaintiff's detailed audit report and also the calculations made by defendant's auditor are in evidence as plaintiff's exhibit No. 1 and defendant's exhibit No. 1, respectively, and are made a part hereof by reference.

Corrected calculations were prepared by plaintiff after a conference with defendant, and are set out in a summary statement which is in evidence as defendant's exhibit No. 2, made a part hereof by reference.

74. During an adjournment of the hearing before the Commissioner of this court, the engineers of plaintiff and the defendant, at the request of counsel for both parties held a series of conferences and agreed upon certain figures which were supposed to be for the assistance of the court. They agreed as to what the labor on the job had actually cost plaintiff. They also agreed that certain other stated figures were what the work would have cost if some hypothetical condition, other than the one that did prevail, had prevailed. But the parties now disagree as to what that hypothetical condition was intended to be. There is no evidence that the engineers had authority to determine what the word "qualified" meant as used in the statute and the contract, or what regulations were or were not validly provided for in the contract or whether or not the statute and the contract provided for a thirty-hour week. The parties did not make any stipulation pursuant to Rule 74 of the rules of this court.

75. The defendant did not, to any substantial extent, promulgate and enforce, subsequent to the date of its contract

with plaintiff, rules or regulations not referred to in and inconsistent with the contract, which rules and regulations, or the enforcement thereof, deprived plaintiff of normal control of its personnel.

The defendant did not, to any substantial extent, misinterpret or wrongfully disregard rules or regulations referred to in its contract with plaintiff, which disregard deprived plaintiff of normal control of its personnel.

The defendant did not, to any substantial extent, fail to supply plaintiff qualified labor under the labor clauses of its contract with plaintiff.

76. Plaintiff has not proved the amount of the damage caused to it by the breaches, which, it alleges, the defendant committed of the labor provisions of the contract, or by the alleged acts or omissions of the defendant which are enumerated in the Act of Congress approved July 23, 1937, under which the labor claims in this suit are brought.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff's suit is based upon a contract dated October 5, 1933, made by it to construct for the defendant a dam known as dam No. 5 in the upper Mississippi River, near the towns of Minneiska, Minnesota, and Fountain City, Wisconsin, and about 100 miles south of St. Paul, Minnesota. Those items of plaintiff's claim related to flood damage, in the amount of $11,764.18, and excess cement required, in the amount of $1,811.91, are presented to the court under its general jurisdiction to give redress for breaches of contract. The major item of plaintiff's claim, amounting to $154,224.30, is brought pursuant to a special jurisdictional Act, approved July 23, 1937, conferring upon this court jurisdiction to give relief to contractors who had constructed locks and dams on the Mississippi River, for alleged excess costs incurred by them as a result of the promulgation and enforcement by the Government of labor regulations not contemplated by the parties when they made their contracts; the misinterpretation and wrongful administration of or failure to apply labor regula-

tions which were embodied in the contracts; and the failure of the Government to supply qualified labor to work on the project. The text of the special Act is given in finding 2. Plaintiff also claims that, even without the special Act, the Government's conduct in relation to the matters involved in the labor claim would have been breaches of contract cognizable by this court under its general jurisdiction. We shall first discuss the labor claim.

Plaintiff's contract contained numerous provisions relating to the sources from which labor was to be obtained, the number of hours which employees might work, and the minimum wages which had to be paid for skilled, unskilled, and intermediate grades of work. These provisions are set out in findings 5 and 6.

The construction of the dam was authorized under the River and Harbor Act of July 3, 1930,[1] and it was a part of the approved program for public works under the National Industrial Recovery Act of June 16, 1933.[2] That Act appropriated several billions of dollars to be used in a nation wide construction program of what came to be known as Public Works Administration Projects, whose purpose was to rehabilitate industry and relieve unemployment, as well as to give the country the benefit of the public works which would be constructed. To insure a wide distribution of the employment which was thus to be furnished out of public funds, the Recovery Act provided that, subject to specified exceptions, persons directly employed on such projects should not be permitted to work more than 30 hours per week.

By an addendum to the invitation to bid, plaintiff and other prospective bidders on dam No. 5 were urged to read carefully Bulletin No. 51 of the Federal Emergency Administration of Public Works before submitting their bids. That Bulletin, the relevant part of which is quoted in finding 6, stated when exceptions would be made to the 30-hour week limitation. It provided that 130 hours of work in a month would be permitted "in localities where a sufficient amount of labor is not available in the immediate vicinity of the work," and that 8 hours a day or up to 40 hours a week would

[1] 46 Stat. 918.
[2] 48 Stat. 195.

be permitted "on projects located at points so remote and inaccessible that camps or floating plant are necessary for the housing and boarding of all the labor employed." But Bulletin 51 further provided "In case the contracting officer shall determine that any project falls within the terms of (b) or (c) hereof, he shall so state in the specifications submitted to bidders." Since no such statement appeared in the specifications, the contract did not embody either of those exceptions to the 30-hour week maximum. This did not, we suppose, necessarily mean that conditions might not develop during the course of performance when the supply of labor might become so scarce, or by disaster the site of the work might become so inaccessible that, under Bulletin 51 or other provisions of the contract, the work week might have been extended. But for the contracting officer to have increased the work week without a new reason for doing so, when plaintiff had made its bid, as it must have done, on the assumption that the work week would be 30 hours, would have been improper. It would have been unfair to the Government, which was paying plaintiff extra compensation for the extra costs resulting from frequently changing shifts of workmen. It would have been unfair to other bidders, who would have bid lower if they had been assured of a longer work week.

Plaintiff was, upon its requests, granted special exceptions to the 30-hour week in many instances referred to in findings 35 to 38. For example on July 9, 1934, when work on this and other dam projects was at its peak and labor was, accordingly, scarce, plaintiff was given a change order permitting a 40-hour week within a 130-hour month until the completion of the contract. Even these limits were raised in many instances upon plaintiff's request. We think plaintiff has no just cause for complaint because the short work week, which was an important part of the law which provided for the building of these dams, and which plaintiff contemplated when it bid for the work, was not abandoned to enable plaintiff to reduce its costs.

Plaintiff complains that, whereas the contract required the Government, through the National Reemployment Service, to furnish it qualified labor, that agency instead supplied

it with unqualified labor. Article 19 of the contract, which is quoted in finding 5, provided in subdivision (a) for preference (1) for citizens, and aliens who had declared their intentions, who are "bona fide residents of the political subdivisions and/or county in which the work is to be performed and (2) * * * for bona fide residents of the state." The same article provided in subdivision (b) that "to the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from lists of qualified workers submitted by local employment agencies designated by the United States Employment Service." The preferences directed in subdivision (a) were to be observed, in securing labor through employment services.

The National Reemployment Service, an agency of the United States Employment Service, in September 1933, established an office at Winona, Minnesota, which was about 18 miles from the project. That office was designated as the office through which plaintiff's labor was to be obtained. It was to serve plaintiff and other contractors constructing locks and dams in the area. The National Reemployment Service had offices with state-wide jurisdiction at St. Paul, Minnesota and Madison, Wisconsin. It also had a local office at Fountain City, Wisconsin, which was 8 miles from the site of the work.

Plaintiff complains that the N. R. S. office did not supply plaintiff with "lists" of qualified workers, or, for that matter, with any lists at all. But the reason was, that at the beginning of plaintiff's work, it began the practice of telephoning to the N. R. S. office at Winona and asking for men, in order to get prompt service. The office then went through its registration cards, selected men who seemed to be qualified, called them in and gave them cards of introduction and reference to plaintiff. The men then applied to plaintiff, were interviewed, and such of them as plaintiff wanted were hired. Plaintiff endorsed the cards of those it hired and returned the cards to N. R. S. N. R. S. at the end of the week made up a list showing the names, residences, and occupations of the men referred by it and hired by plaintiff, and sent plaintiff the list. Beginning in November 1933, plain-

tiff, in addition to telephoning its requests for labor, sent form No. 104 confirming in writing its telephoned requests. Plaintiff never asked for "lists" of workers, never indicated in any way that it wanted them, and offered no proof that it would have been better off with such lists than without them. There is no evidence or claim that N. R. S. discriminated against plaintiff or failed to fairly apportion the labor supply to the demand of the contractors who used the service.

We consider now plaintiff's claim that N. R. S. failed to supply it with qualified workers. By the express provisions of the contract, and one of the prime purposes of the Recovery Act, local residents were to have preference. Both the geography of the region and a trip of investigation made by plaintiff's representative before bidding on the contract, disclosed to plaintiff what the labor situation would be. The available common labor would be farmers and small townsmen, who had never worked on a heavy construction job. The carpenters would be experienced in building houses and barns, rather than forms for setting concrete. Workmen of other trades would, on the whole, have had similarly limited experience. In comparison with the rough and ready "jack of all trades" type of construction gang labor that plaintiff had been accustomed to use when the only object was to get the job well done with the greatest speed and the least expenditure possible, this rural labor was green and awkward, and required some breaking in. But was it "unqualified" to do this work, as plaintiff should reasonably have understood the word "qualified" as used in the contract? If it was, the purpose of the Recovery Act and of Article 19 of the contract, to give employment in communities where men had their homes, was nullified. A farmer, strong and intelligent, who lived adjacent to the project could not get a job, paid for by his Government, as a common laborer, because he had never had a concrete vibrator in his hands before and would have to learn how it worked, just as he had learned how to harness a horse or operate a corn cultivator. A carpenter who had built houses and barns would be passed over because he would be inclined, out of habit, to put more nails in temporary forms than were necessary, and would have to

be told how to do it differently. There is no evidence that the communities from which labor was sent to plaintiff were below the average of American communities or that the general run of individuals who applied for plaintiff's jobs, and were interviewed and hired by plaintiff, were below the average of their communities. Particular individuals were, no doubt, unqualified, as they would have been if they had been hired from any source other than a pool of recent former employees of plaintiff. But the contract, for valid reasons, did not permit plaintiff to recruit its labor from that limited source, and plaintiff has no right to complain that it was not permitted to do what it had agreed not to do.

Plaintiff compares its workmen on this job with the ideal construction gang. But the restriction of the work week to 30 hours would have made it impossible to get ideal help on this job, except at much higher wages than plaintiff paid these local workmen. Few persons "qualified", as plaintiff would define that word, would have found it necessary to go so far and pay board in plaintiff's camp for so little work as 30 hours a week. But even if plaintiff could have recruited such an ideal gang, it had no right to do so, in the face of its promise to give preference to local residents who were qualified. That important restriction on plaintiff's freedom of hiring was not put in merely to be nullified by being read as "ideally qualified", or "qualified beyond what the parties, in the circumstances have any right to expect."

We think that plaintiff was not, to any extent that it has proved, put to extra expense by reason of the Government's failure to furnish qualified workmen.

Plaintiff complains that the Government would not allow it to require its employees to stay in the camp, so that they would be available for emergencies. We think that for plaintiff to refuse to hire a farmer as a laborer, because, after his short day's work, he wanted to do his chores and be with his family would have been a contradiction of the preference for local labor required by the Recovery Act and by the contract.

Plaintiff was treated with great consideration in regard to bringing in supervisors and keymen to tone up the labor force, especially during the early period of construction

when the local labor was still green and inexperienced. Many men known to and invited by plaintiff came and registered at the N. R. S. office and were sent to and employed by plaintiff.

Plaintiff complains that the Government enforced rules which were not embodied in the contract. One instance alleged is that the N. R. S. refused to require applicants from distant points, such as St. Paul, to travel to the site of the job for interviews as to jobs which were to become available in the future. We think the N. R. S. was entirely reasonable in this position. We think that if plaintiff desired to have preliminary interviews with workmen from St. Paul before even giving them a trial on the job, it should have sent an agent to St. Paul for the interview, rather than requiring the workmen to travel so far at their own expense for nothing more than an interview.

Another kind of alleged enforcement of rules inconsistent with the contract is that nonworking foremen were told, on several occasions, that if they worked or used tools, they must be limited to 30 hours a week. Plaintiff says that the contract did not forbid foremen from using tools. But it did provide that those laboring on the project should be limited to 30 hours a week. And it has been necessary, on other projects if not on this, to draw a strict line between working and nonworking foremen in order to prevent evasion of the 30-hour week restriction. It may be that in the instances which plaintiff cites, it would have been sensible for the inspectors to have overlooked the fact that a nonworking foreman used a tool. But one who has agreed to abide by a regulation can hardly claim that he is legally damaged by its strict enforcement. Besides, we are furnished no evidence as to what, if anything, the enforcement of the regulation cost plaintiff.

Another principal element in plaintiff's claim that labor regulations not contemplated by the contract were imposed upon it, was the so-called "one to one" rule. This rule required that the total number of helpers in any craft should not exceed the number of journeymen or skilled workers in that craft. The facts, as we have found them, relating to this problem, appear in findings 38 to 53. The reason for the imposition of the one to one rule upon all public works proj-

ects was that during the early part of 1934 complaints were received by the War Department and the Board of Labor Review of the Federal Emergency Administration of Public Works that contractors were violating their contracts in regard to the classification of workmen, by classifying skilled workmen as semiskilled and thus paying them lower rates. Plaintiff, like other contractors, had agreed to a scale of minimum wages for skilled, unskilled, and semiskilled workmen. This agreement did not contemplate that the wages of a particular workman could be arbitrarily set by plaintiff merely by assigning to him, on the pay roll, a certain status. It meant that he should be assigned, on the pay roll, the classification to which the work which he actually did entitled him. And it meant that the defendant, being a party to the contract, would properly have something to say about whether the classification assigned was correct or not. We think that for the defendant, out of its experience on this and other contracts, to generalize its position with regard to the number of workmen who could properly be classified as helpers, by saying that they should not exceed the number of skilled craftsmen whom they were supposed to be helping, was not unreasonable. In this way both the contractors and the Government could be sure, without constant and minute inspection, that the contracts were not being seriously violated. In this case, although the contract work had been going on for most of a year when plaintiff wrote the contracting officer on September 15, 1934, yet plaintiff said, about this regulation, "In our particular case no present hardship will be worked upon us, but should there arise a condition where this ruling would work a hardship on us, we would expect to be paid the additional costs incurred." The enforcement of the "one to one" rule was delayed long after the order of August 20, 1934, which promulgated the rule, while the negotiations with regard to an appeal to the Board of Labor Review, recited in findings 46 to 53, were being carried on. In the meantime plaintiff seems to have complied with the requirements of the rule, though the operation of the rule was suspended. Plaintiff has not, however, shown to what extent it reorganized its working force because of the promulgation of the rule, or at what additional cost. As to car-

penters, who comprised a large proportion of the skilled workmen on the job, the rule had no effect, since the proportion of helpers was always much smaller than one to one. There is some evidence that a skilled pipe fitter was added, because of the rule, to a gang that had formerly consisted of one skilled man and two helpers. As to how many gangs this change applied to, and for how long, we do not know. The testimony suggests that the added man was completely wasted, but does not say that he did no work, or that there was nothing useful for him to do, which would have minimized the loss. In this state of the record, of course, no recovery could be allowed, even if we thought that the one to one rule was improperly promulgated.

FLOOD DAMAGE

Findings 55 to 64 relate to this item of plaintiff's claim. Plaintiff, in order to get materials to the site of the work, built a spur track on the Wisconsin side of the river, from the main line of the Chicago, Burlington and Quincy Railroad to the site of the dam. This spur track crossed about two miles of flood plain, including several sloughs, the largest of which is called Indian Creek. A part of the track was built below the level of the flood stages shown on the hydrographs which were furnished plaintiff before it bid. Fourteen times since 1910 floods had reached stages higher than the level of the track. The contracting officer notified plaintiff that the track was too low, and that the four 30-inch culverts in it were not sufficient to let the water through the track embankment. Plaintiff replied that it would breach the embankment if a flood came which required it.

In connection with dam 5, which was the subject of plaintiff's contract, the Government caused to be built an earth dike, extending upstream about three and one-half miles from the abutment of the dam on the Wisconsin side, and parallel with the river, to high ground. The contracts for the dike and the dam were let at about the same time and the two jobs proceeded simultaneously. Indian Creek opened into the river about a mile and a half above the dam, and also at some point below the dam. There had been a rock and brush dam across the upper opening of Indian Creek for some time past,

to prevent the water of the river in ordinary stages from being dissipated into the slough. This dam was not high enough to prevent the river, in flood stages, from overflowing into the slough. The dike contractor obtained permission from the Government to breach the rock and brush dam and substitute for it a temporary earth dam at a location on Indian Creek, where it would serve the same purpose but would not interfere, as the rock and brush dam did, with the construction of the new permanent dike.

As shown in finding 59, a flood came in early April 1934, which rose to a level about 6 feet higher than that of the old rock and brush dam. The new temporary earth dam washed out, and also a considerable segment of the embankment of plaintiff's spur track. Plaintiff, on the day after these events, wrote the contracting officer requesting an extension of time for completion on account of unforeseeable difficulties caused by the flood, but made no claim that the destruction of its track was due to any fault of the Government. Not until a month later did it make this claim, and then it attributed the damage, to a considerable extent, to the fact that the gate of the lock on the Minnesota end of the dam was kept closed. In fact, the lock had not been completed to the point where the gate could have been opened without serious damage to the structure.

Whether plaintiff's track would have washed out if the temporary dam which the Government caused to be built had not washed out, we can only guess. The flood was such that it overtopped both the track and the dam before either washed out. The dam was a mile and a half from track, and the course of the slough between the two was wide and full of trees and brush. Thus any sudden rush of water through the breach in the dam would probably have spent itself in the waters which covered and surrounded it before it reached plaintiff's track. Plaintiff did not breach the track embankment, which it had said that it would have to do to save the embankment if a flood came. The whole course of events does not persuade us, as plaintiff has the burden of doing, that the washing out of the temporary dam was the cause of the damage to plaintiff's track. It is not, therefore, necessary for us to decide whether the Government's permit-

ting the dike contractor to replace the rock and brush dam with a temporary earth dam created an obligation on the part of the Government, to plaintiff, that the earth dam would withstand a flood.

EXCESS CEMENT

The facts relating to plaintiff's claim for the cost of excess cement required are stated in findings 65 to 72. In brief, plaintiff's contention is that the contracting officer required plaintiff to add cement to the concrete mixture in order to produce greater uniformity of surface texture; that, under the contract, plaintiff was under no obligation to produce the kind of surface texture which the contracting officer was insisting on; and that therefore the cement required for this purpose was in addition to the requirements of the contract and should be paid for in addition to the contract price.

The contracting officer's letter of April 10, 1934, which is quoted in finding 66, referred to nonuniformity of surface texture as an indication of inadequacy of workability, which was one of the qualities of concrete required by Sections 5-01 and 5-13 (b) of the specifications. There is no reason to suppose that that letter was not written in good faith. If it had not been, it would not have mentioned, in its first paragraph, the matter of "uniformity of surface texture," which laid it open to plaintiff's claim here that the contracting officer was requiring something not called for by the contract. We therefore assume, as we must, in the absence of any reason for not doing so, that the contracting officer was requiring added cement in order to obtain what he regarded as proper workability. Section 5-13 (b) of the specifications was as follows:

> The exact proportions of all materials entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all materials entering into the concrete. The proportions will be changed whenever, in the opinion of the contracting officer, such change becomes necessary to obtain the specified strength and the desired density, uniformity, and workability, and the contractor will not be compensated because of such changes.

In addition to the quality of strength, which could be definitely tested by crushing sample cylinders of the concrete, the

other agreed qualities of density, uniformity, and workability were qualities as to which persons, even experts, might differ in their opinions. But the quoted section of the specifications lodged the power of decision as to these matters in the contracting officer, and did so in the most unmistakable language. The contracting officer made his decision. It was appealed by plaintiff to the Chief of Engineers, who was at first inclined to reverse the decision of the contracting officer, but who, after a fuller explanation by the contracting officer, denied plaintiff's claim. In these circumstances, we have no reason to substitute our opinion concerning this concrete for the opinion which, according to plaintiff's contract, was to be controlling.

Plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM WALKER JOHNSON v. THE UNITED STATES

[No. 45535. Decided February 1, 1943]

On the Proofs

Pay and allowances; bachelor officer in National Guard on Federal duty as officer in the United States Army, Cavalry Reserve; dependent mother.—Following the decision in *Donald K. Mumma* v. *United States*, p. 261, *ante*, it is *held* that, where the dependency of plaintiff's mother is well established, the plaintiff, an officer in the National Guard of the United States, on active duty with the Army, is entitled to recover for rental and subsistence allowances as provided by law for an officer of his rank and length of service, with dependents, for the periods involved in plaintiff's claim.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. At all times material to the proceeding, plaintiff was a Major in the National Guard of the United States. An official statement of his military service as furnished by the War Department is as follows:

> 1. The records of this office show that William Walker Johnson, serial number 0–266,698, was Federally recognized as 2nd Lieutenant, Cavalry, Ohio National Guard, August 1, 1929; appointed 2nd Lieutenant, Cavalry Reserve, September 27, 1929; accepted October 24, 1929; Federally recognized as Captain, Cavalry, Ohio National Guard, April 1, 1930; appointed Captain, Cavalry Reserve, June 23, 1930; accepted July 11, 1930; terminated August 9, 1934.
>
> 2. He was appointed Captain, Cavalry, National Guard of the United States, April 4, 1934; accepted August 10, 1934; Federally recognized as Major, Cavalry, Ohio National Guard, October 20, 1939; appointed Major, Cavalry, National Guard of the United States, December 13, 1939; accepted December 30, 1939; and is now a Major in that Corps.
>
> 3. He entered on active duty March 5, 1941, pursuant to the order of the President, dated January 14, 1941.

2. Plaintiff performed active duty during the period from August 11 to August 31, 1940, inclusive, during which time he was on maneuvers in the State of Wisconsin, and from October 13 to October 20, 1940, inclusive, during which time he was stationed at Fort Oglethorpe, Georgia, watching the functioning of the Sixth Cavalry, a horse mechanized regiment. He began service on active duty March 5, 1941, as a Major pursuant to the order of the President dated January 14, 1941, and was still serving in that capacity when he testified in this proceeding March 10, 1942. He is a bachelor officer.

3. Plaintiff's father, William Cleveland Johnson, is seventy-six years of age and his health is not good. He formerly owned and operated a candy manufacturing company but it became bankrupt in 1935. Since then he has carried on a small candy packing and candy jobbing business in Cincinnati, Ohio. His business has steadily de-

creased and while the exact amount of his present earnings is not shown from the record, it does not exceed approximately $10 a week. Because of his small earnings, plaintiff and plaintiff's brother have at times assisted him financially.

4. Plaintiff's mother, Mrs. Sara Pollock Johnson, is seventy-three years of age and she is in fairly good health. She has never been engaged in business or otherwise gainfully employed.

Her father, William Pollock, died intestate in 1922 leaving a rather large estate consisting of corporate stock in the William Pollock Milling & Elevator Company, a residence and an adjoining unimproved lot, a wholesale grocery business, and a coal yard, all located in Mexico, Missouri. She and her brother, William Walker Pollock, inherited the entire estate. With her assent, the brother administered and managed the estate. He had had extensive business experience and then and at various other times owned considerable property. Plaintiff's mother had such confidence in her brother that she allowed him to assume complete control of the estate and he handled it as if it were his own property. Plaintiff's mother signed without question any papers or documents which he presented and plaintiff and his father did not oppose such action since they likewise had confidence in plaintiff's uncle.

Over a period of years William Walker Pollock became involved in numerous speculative ventures. Beginning in 1929, he became over-extended and in the next few years lost not only his own property but also the property of the estate. At one time he conveyed to his sister (plaintiff's mother) a 540-acre farm in order to cover some $27,000 of her money which he had used but she later conveyed this farm back to him without consideration and it has since been lost. Plaintiff's mother still has an equity in the William Pollock Milling & Elevator Company. That company was in receivership and is now managed under an arrangement with the creditors. The stock has not paid dividends for thirteen or fourteen years. The brother of plaintiff's mother is receiving a salary of $50 a week in running that business which, insofar as is known to plaintiff or his mother, is his sole source of income. While plaintiff's mother may have

had or may now have grounds for a suit against her brother because of a breach of his fiduciary obligations in dealing with her share of the property which she inherited from her father, she has no inclination or desire to prosecute such a suit and it is very doubtful whether any recovery could be had because of his financial condition.

5. During the periods involved in this proceeding, plaintiff's parents have owned no real estate or personal property that has produced income. Prior to the time he entered active duty in the Army, plaintiff resided with his parents in a rented apartment in Cincinnati, Ohio, and since that time plaintiff's parents have resided alone. They pay $50 a month rent for the apartment which includes heat and water, approximately $35 a month for food, $6 or $7 a month for gas and electricity, $4.50 a month for telephone, and $18 a month for a laundress and household service. Plaintiff has regularly contributed $140 a month to his parents since August 11, 1940. His contribution is used by them to pay the household expenses set out above and the balance is used by his mother to pay her own personal items of living expense such as clothes and other incidental expenses.

6. Plaintiff has one brother, Douglas Pollock Johnson, who is a Commander in the United States Navy. He is married and has one child. He makes no contribution to the support of his mother except occasional gifts which amount to approximately $50 a year.

7. During the period involved in this suit, plaintiff was on active duty and occupied quarters as follows:

August 11, 1940, to August 31, 1940, he was on maneuvers in Wisconsin and was assigned no quarters;

October 13, 1940, to October 20, 1940, he was stationed at Fort Oglethorpe, Georgia, and occupied quarters at or under the control of the Officers' Club for which he paid the Club $1 a day;

March 5, 1941, to March 16, 1941, he was stationed at Cincinnati, Ohio, during which time he lived at home with his parents, and was not assigned quarters;

March 17, 1941, to August 13, 1941, he was stationed at Camp Forrest, Tennessee, where he was assigned one room at officers' barracks which was suitable for a bachelor officer;

August 13, 1941, to September 2, 1941, he was on maneuvers in Arkansas and was not assigned quarters;

September 2, 1941, to December 18, 1941, he was in a continuous travel status and no quarters were assigned;

December 18, 1941, to January 23, 1942, he was stationed at Fort Meade, Maryland, and occupied one room in an officers' barracks. The room so occupied was administratively determined to be inadequate quarters;

January 23, 1942, to January 27, 1942, he was in travel status from Fort Meade, Maryland, to Camp Forrest, Tennessee, and no quarters were assigned;

January 27, 1942, to February 2, 1942, while at Camp Forrest, Tennessee, the quarters occupied by him were administratively determined to be inadequate and in addition plaintiff paid rental to the officers' mess;

February 4, 1942, to March 10, 1942, when he testified in this proceeding, plaintiff had been stationed in Washington, D. C., and no quarters had been assigned.

8. None of the quarters occupied by plaintiff during any of the periods set out in the preceding finding were adequate for an officer with dependents. During the same periods, plaintiff was in fact the chief support of his mother who was dependent on him for such support.

9. Increased rental and subsistence allowances, for an officer of plaintiff's rank and service on account of a dependent mother for the periods from August 11 to 21, 1940, inclusive, and from October 13 to 20, 1940, inclusive, amount to $73.47, as shown by computations submitted by the General Accounting Office.

10. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover in an opinion *per curiam*, as follows:

The facts in this case establish a clear case of dependency. Plaintiff was and is the chief support of his mother.

Under the decision in the case of *Mumma* v. *United States*, No. 45338, decided this day, plaintiff is entitled to recover rental and subsistence allowances on account of a dependent mother from August 11, 1940, to date of judgment. The claim is a continuing one.

Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due in accordance with this opinion.

In accordance with the above opinion and upon report of the General Accounting Office showing the amount due thereunder to be $2,304.74, and upon plaintiff's motion for judgment, it was ordered May 3, 1943, that judgment be entered for the plaintiff in the sum of $2,304.74.

JOHN A. MOIR, EXECUTOR OF THE WILL OF JOHN MOIR, DECEASED, v. THE UNITED STATES

[No. 45313. Decided April 5, 1943]

On the Proofs

Income tax; revocable trust; income from trust property is for tax purposes income of settlors.—Where partners sold partnership business, established trust for purpose of paying pensions or allowances to former employes, and dissolved the partnership; and where the trustees, including two of the partners, had power of revocation and power to hold income for or to distribute it to the grantors; the two trustees did not have "substantial adverse interest" within the provisions of the Revenue Act of 1936, and the income from the trust property was for tax purposes the income of the individual settlors, since the trust was revocable. 49 Stat. 1648, 1707.

Same.—Where trustees of trust fund did not have substantial adverse interest which would deter them from consenting to a revocation of the trust, it was revocable.

Same; deduction for taxpayer's portion of income from trust for former employes.—Where partners sold partnership business, established trust for purpose of paying pensions or allowances to former employes, and dissolved partnership, the partners were entitled to deduct on their individual income tax returns for the tax years 1936 and 1937 their respective portions of income of trust which was actually paid to the beneficiaries as "an ordinary and necessary expense" of business under section 23 (a) of the Revenue Act of 1936. *Flood* v. *United States*, 133 Fed. (2d) 173, cited.

The Reporter's statement of the case:

Mr. Philip Nichols for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is the executor under the will of John Moir, a resident of Newton, Massachusetts (hereinafter sometimes referred to as the "taxpayer") who died September 20, 1938.

2. March 15, 1937, the taxpayer filed his income-tax return for the year 1936 on the cash basis and paid the tax of $60,674.99 shown to be due on that return as follows:

March 15, 1937	$15, 111. 24
April 8, 1937	57. 51
July 14, 1937	15, 168. 75
September 17, 1937	15, 168. 75
December 15, 1937	15, 168. 74

Additional income tax for the year 1936 in the amount of $982.86 was assessed against the taxpayer and paid by him April 22, 1938. Interest on the additional assessment in the amount of $65.02 was paid by the taxpayer May 13, 1938, making a total amount of $61,722.87 paid as tax and interest for the year 1936.

On that return the taxpayer included in gross income under the item "Income from Fiduciaries," an amount of $16,332.94 which represented a part of the net income of a trust known as the Chase & Sanborn Pension Fund hereinafter referred to.

3. March 15, 1938, the taxpayer filed his income-tax return for the year 1937 on a cash basis showing a tax due of $62,261.30 which was paid as follows:

March 15, 1938	$15, 565. 33
June 15, 1938	15, 565. 33
September 15, 1938	15, 565. 32
December 15, 1938	15, 565. 32

Additional income tax for the year 1937 was assessed against the taxpayer in the amount of $5,065.44 and paid October 4, 1939, together with interest of $471.71, making the total amount of tax and interest paid for the year 1937 $67,798.45.

On that return the taxpayer included in his gross income under the item "Income from Fiduciaries," an amount of $16,841.36 which represented a part of the net income from the Chase & Sanborn Pension Fund.

4. The partnership of Chase & Sanborn (hereinafter sometimes referred to as the "partnership") was formed in

Boston, Massachusetts, in 1878, and was engaged from that time until 1929 in the business of importing and jobbing tea and coffee. During that period the partnership was made up of a succession of different combinations of partners. The taxpayer became a limited partner about 1907, a full partner about 1912, and in 1929, when the sale hereinafter referred to was made, he was the senior partner of the firm as it then existed.

5. July 16, 1929, the partnership was sold as a going business to Standard Brands, Inc. The sale included all the assets of the business and was subject to all its liabilities except a few obligations of the partnership which the purchaser did not assume and which the partners took over. Thereafter neither the partnership nor any of the partners engaged in any new transactions carrying forward the business. Neither the partnership nor the partners, as such, were engaged in business in 1936 and 1937 except as they, through the trust, the Chase & Sanborn Pension Fund, were engaged in paying out compensation to former employees, as shown hereinafter. No gross income was received either by the partnership or the partners, as such, in those years. Upon the sale of the business, a fund of $50,000 was set aside from the proceeds and turned over to one of the partners to be used by him to discharge the expenses of the sale, and the liabilities and obligations of the partnership which had not been assumed by Standard Brands, Inc. More than the $50,000 so set aside was eventually required for these purposes and the individual partners contributed whatever additional funds were needed. These debts and expenses were fully paid and discharged in that manner before 1936.

6. The partnership had no definite pension plan and was under no legal obligation to pay pensions to its employees, but for a considerable period prior to 1929 it had been the practice and policy of the partnership to take care of its old employees by keeping them employed at a reduced compensation as long as they were able to perform some work and when they became unable to work at all to continue to pay them part of their salaries. This policy was followed in recognition of a moral obligation on the part of the partner-

ship towards these employees because of their long years of valuable service to the partnership.

7. While negotiations were taking place for the purchase of the business by Standard Brands, Inc., the question was discussed with the purchaser as to whether arrangements could be made to take care of the old employees, but the purchaser refused to give any consideration to such a proposition and no arrangements of that nature were made with the purchaser. At that time the partnership had between 400 and 500 employees of whom 60 or 70 were approaching the end of their active lives and had been with the firm for twenty-five years or more. In view of this situation the partners determined that provision should be made by them to take care of these old employees in their declining years. Sometime prior to the date of the sale a trust instrument was accordingly drafted under which each of the partners made a contribution to the trust in proportion to his interest in the partnership and that instrument was executed by the partners on the day of the sale. The trustees named in the instrument were the taxpayer John Moir, William T. Rich another partner, and the Day Trust Co.

The trust instrument read in part as follows:

> WHEREAS the CONTRIBUTORS have been heretofore associated together as co-partners doing business as Chase & Sanborn, and have sold said business to Standard Brands, Inc.; and
>
> WHEREAS the CONTRIBUTORS desire to create a pension fund to be used for the benefit of former employees of Chase & Sanborn (hereinafter called the BENEFICIARIES) as a reward for their faithful service in the employ of Chase & Sanborn and in order, in some instances, to ameliorate their condition in life; such benefit to accrue immediately in some cases and to be deferred in others:
>
> NOW THEREFORE the CONTRIBUTORS, each in consideration of the contribution of every other of them, and other good and valuable consideration, respectively sell, assign, transfer and deliver to the TRUSTEES the property described and set opposite their respective names in the schedule hereto annexed marked "Schedule A", to hold, manage, invest and reinvest the same and any additions that may from time to time be made thereto, in trust for the following purposes:

1. Except as hereinafter provided, to pay from the income to the BENEFICIARIES named in the schedule hereto annexed marked "Schedule B", or use and apply for their benefit, the monthly payments set opposite their respective names.

2. Except as hereinafter provided, to pay from the income to such of the BENEFICIARIES named in the schedule hereto annexed marked "Schedule C" as the TRUSTEES shall from time to time determine, or use and apply for their benefit the monthly payments set opposite their respective names.

3. To pay to the CONTRIBUTORS annually, in proportion to their contributions, or to their legal representatives, such part of the income as the TRUSTEES in their uncontrolled discretion shall determine to be not required for the purposes hereinbefore set forth.

4. To pay from the principal to or for the benefit of the BENEFICIARIES from time to time, such sums as may be necessary for the purposes set forth in Paragraphs 1 and 2 hereof (if the income shall be insufficient for such purposes) until the aggregate amount of principal so expended in that year and prior years shall equal the aggregate amount of income paid in that year and prior years to CONTRIBUTORS as provided in Paragraph 3 hereof, and thereafter to use for the purposes set forth in Paragraphs 1 and 2 hereof such further parts of the principal as the TRUSTEES shall by unanimous vote determine.

5. To pay over and distribute from time to time to the CONTRIBUTORS, in proportion to their contributions, or to their legal representatives, such part or parts of the principal as the TRUSTEES in their uncontrolled discretion shall determine to be no longer required for the purposes of the trust.

6. Upon the death of the survivor of the BENEFICIARIES named in said Schedules B and C, to pay to the CONTRIBUTORS in proportion to their contributions, or to their legal representatives, the principal as it shall then be, with any accrued income, and the trust shall thereupon terminate.

[Then followed other sections which gave the trustees full power to manage and deal with the property of the trust, made provision for filling vacancies among the trustees, and set out other similar provisions.]

The trust instrument contained the following further provisions:

13. The persons who shall receive the benefits of the pensions hereunder shall have no right, title or interest of any kind or nature in and to said trust or the income thereof or any portion of the same until such sums as may be paid to them actually come into their hands. The TRUSTEES at any time may temporarily or permanently discontinue payments to any BENEFICIARY OR BENEFICIARIES, provided however that any periodical payment once determined to be paid to any BENEFICIARY shall be continued without change during the life of such BENEFICIARY, unless the then TRUSTEES shall by unanimous vote otherwise determine. The interest of any BENEFICIARY hereunder, either as to income or principal, shall not be anticipated, alienated or in any other manner assigned by such BENEFICIARY, and shall not be subject to any legal process, bankruptcy proceedings, or the interference or control of creditors or others.

* * * * *

15. This agreement may be modified or amended at any time by the unanimous vote of the TRUSTEES for the time being, signified by their written signatures to such amendment, except that they shall have no power to modify the provisions herein made for distribution of the principal. Additional persons who will receive benefits hereunder may be added at any time or times within three years from the date hereof by unanimous vote of the TRUSTEES, provided that such additional persons shall have been employees of Chase & Sanborn prior to the date hereof.

8. In determining the amount of principal to be set aside for the pension fund, the partners estimated that an annual income of approximately $50,000 would be required for trust purposes and they accordingly contributed a total of 6,858 shares of Standard Brands, Inc., 7 percent first preferred stock of an approximate value of $800,000, each partner making his contribution in proportion to his interest in the partnership. The contributions of the partners were as follows:

John Moir	2,512	shs.	Standard	Brands,	Inc.,	1st	pfd.
William T. Rich	1,288	"	"	"	"	"	"
Frederick A. Flood	966	"	"	"	"	"	"
Harry L. Jones	1,031	"	"	"	"	"	"
Francis W. Kimball	322	"	"	"	"	"	"
Charles R. Butler	322	"	"	"	"	"	"
John Anderson	238	"	"	"	"	"	"
Henry T. Brown	179	"	"	"	"	"	"

In determining which of the employees would be entitled to the pensions, the partners selected such persons as had been in the service of the partnership twenty-five years or more, and, in the case of men, had reached the age of sixty-five and in the case of women, the age of sixty. The amount of the pensions varied in accordance with the previous salaries or wages and the character of duties performed, and at first ranged from $30 to $200 per month. Later, when the income of the trust was smaller, it became necessary to make a proportionate reduction in the amounts paid to the pensioners, all of whom were former employees of the partnership except certain widows of former employees who, by amendment of the trust instrument, had been included. The sum paid to widows amounted, each year, to $1,980.00.

The amounts paid to the old employees and their widows under that plan, when added to the salaries formerly paid to the employees, did not exceed reasonable compensation for past services rendered by the employees.

9. Prior to 1934, the trustees treated the income of the trust which was paid out to the beneficiaries as taxable to the beneficiaries and advised them to return these amounts as taxable income in their federal income tax returns. However, with the passage of the revenue act of 1934, the trustees advised the contributors (including the taxpayer) as follows:

> The Trustees of the Chase and Sanborn Pension Fund—acting under legal advice—have up to the return of 1934 income reported the income of the Fund as being taxable to the beneficiaries in so far as they received payments from the fund.
>
> With the passage of the Revenue Act of 1934 the Trustees again obtained legal advice. After considerable discussion—for the legal aspects are involved and open to argument—we are of the opinion that 1934 income of the Fund should be reported by the Donors of the Fund in their individual returns in amounts in proportion to their contributions to the Fund.
>
> As soon as possible, the Day Trust Company will advise you as to the amount which should be included in your return.
>
> The Trustees have the sections of the indenture which apparently cause the income of the Fund to be taxable to

the Donors under consideration and are discussing the proper method of correcting them.

10. During 1936 and 1937 the amount of income earned by the trust was slightly in excess of the total amounts paid out by the trustees to the beneficiaries. The amounts of the net income of the trust for 1936 and 1937, which were attributable to the contribution to the corpus of the trust by the taxpayer Moir, were $16,332.94 and $16,841.36, respectively. Consistent with the advice given by the trustees, set out in the preceding finding, the taxpayer, as shown by findings 2 and 3, included these amounts as a part of his gross income in his original returns filed for those years.

11. During 1936 and 1937 the trustees paid out of the income from the trust fund to the beneficiaries the respective amounts of $41,480 and $37,932.50. Based upon the proportionate amount contributed by him in the creation of the trust fund, the taxpayer Moir's shares of the foregoing amounts were $15,194.12 and $13,894.67 for 1936 and 1937, respectively.

12. November 22, 1939, plaintiff filed amended income-tax returns for the calendar years 1936 and 1937. In the amended return for 1936, plaintiff showed a tax due of $51,540.01 upon the basis that no part of the amount of $16,332.94, referred to in findings 2 and 10, constituted income to the taxpayer; or, in the alternative, a tax due of $52,237.50 upon the ground that if the amount of $16,332.94 constituted taxable income, the taxpayer was entitled to a deduction therefrom of $15,194.12, such amount representing his share of pension payments made from the Chase & Sanborn Pension Fund.

In the amended return for 1937, plaintiff showed a tax due of $57,537.09 upon the basis that no part of the amount of $16,841.36, referred to in findings 3 and 10, constituted income to the taxpayer; or, in the alternative, a tax due of $58,635.89 upon the ground that if the amount of $16,841.36 did constitute income to the taxpayer he was entitled to a deduction therefrom of $13,894.67, such amount representing his share of pension payments made from the Chase & Sanborn Pension Fund.

13. At the same time the amended returns were filed, namely, November 22, 1939, plaintiff filed claims for refund consistent with those amended returns in which refunds were demanded for the years 1936 and 1937 in the respective amounts of $10,117.84 and $9,789.65. In each of these claims for refund plaintiff assigned as grounds therefor that no part of the income of the Chase & Sanborn Pension Fund was taxable to the taxpayer under the provisions of sections 166 and 167 of the revenue act of 1934. In the alternative it was contended that in the event income from that fund was properly includible in gross income, the taxpayer was entitled to a deduction as ordinary and necessary business expenses for his proportionate share of the amounts paid to the pensioners from the fund in those years.

14. The claim for refund for 1936 was rejected by the Commissioner of Internal Revenue December 11, 1940. More than six months had passed since the filing of the claim for refund for 1937 before this suit was brought and the Commissioner had not advised plaintiff of any action taken thereon.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, executor of the will of John Moir, deceased, sues to recover income taxes paid for the years 1936 and 1937. Moir was taxed upon a proportionate part of the income received by a trust, the Chase and Sanborn Pension Fund, which had been set up by Moir and other partners in the partnership of Chase and Sanborn. When the partners sold the partnership business to Standard Brands, Inc., in 1929, the partners contributed, in the proportion in which they had owned the business of Chase and Sanborn, a total of $800,000 to the Pension Fund, the income to be used to pay pensions to the former employees of Chase and Sanborn who had had many years of service. Moir, the partner who had owned the largest interest in Chase and Sanborn, Rich, another partner, and the Day Trust Company were made trustees of the Pension Fund.

The trust agreement created no legal rights in the old employees. The fund was to revert to the contributors when its purpose had been served. The trust agreement could be modified or amended at any time by the unanimous vote of the trustees.

Plaintiff claims, first, that no part of the income of the trust was Moir's income on which he could be taxed because, he says, the trust was not a revocable trust within the provisions of Sections 166 and 167 of the Revenue Act of 1936, since Rich had a substantial interest adverse to revoking the trust and revesting the title to the trust property in the former partners, including Moir, who had contributed to the fund.

Plaintiff claims, second, that even if the income of the trust was income of the former partners in proportion to their contributions to the fund, and otherwise taxable, the income had been spent to pay "ordinary and necessary expenses * * * in carrying on * * * trade or business", and the expenditure was a legitimate deduction from Moir's income within the provisions of Section 23 (a) of the Revenue Act of 1936 and he therefore should not have been taxed upon it.

The Government contends, first, that the income was Moir's for tax purposes because Rich did not have a substantial adverse interest which would have deterred him from consenting to a revocation of the trust, and, second, that the expenditure of the income to pay pensions to former employees to whom the partners were under no legal obligation, at a time when the former partners were engaged in no business except that of paying these pensions, through the trust, was not a business expense within the meaning of Section 23 (a) and was, therefore, not deductible.

Plaintiff sued in the District Court of the United States for the District of Massachusetts to recover taxes paid upon Moir's 1938 income from January 1 to September 20, the date of Moir's death. That suit related to the tax upon the same Pension Fund, the income of which was received and distributed in the same way as was done in 1936 and 1937, the years covered by this suit. The contentions of the parties were the same in that case as in this. The District

Court decided both issues against plaintiff. *Flood* v. *United States*, 44 F. Supp. 509.

Plaintiff appealed to the Circuit Court of Appeals for the First Circuit. That Court decided the first issue against plaintiff. On the second issue, it held that the pensions paid by the trust were deductible business expenses, and that plaintiff was entitled to have Moir's income taxes recomputed to allow those deductions. *Flood* v. *United States*, 133 F. (2d) 173.

We agree with the decision of the Circuit Court of Appeals in the *Flood* case and with the reasons given in the opinion. We conclude that plaintiff should have been permitted to deduct from Moir's income for 1936 and 1937 Moir's proportions of the pensions paid by the trust.

Plaintiff is entitled to recover. The entry of judgment will be suspended to await the filing of a stipulation by the parties showing the exact amount due plaintiff in accordance with this opinion.

WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting:

I am of opinion that plaintiff is not entitled to recover any amount for the reasons stated by Judge Ford in *Flood* v. *United States*, 44 Fed. Supp. 509, 513, 514.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion, and upon the filing of a stipulation by the parties, in which it was stated that for the year 1936 there was an overpayment of income tax in the amount of $9,411.83 and an overpayment of interest in the amount of $65.02, a total of $9,476.85; and for the year 1937 an overpayment of income tax in the amount of $8,677.23 and of interest in the amount of $471.71; and upon the plaintiff's motion for judgment, it was ordered June 7, 1943, that judgment be entered for the plaintiff in the sum of $18,625.79, with interest on $65.02 from May 13, 1938; on $982.86 from April 22, 1938; on $8,428.97 from December 15, 1937; on $5,537.15 from October 4, 1939; and on the remainder of $3,611.79 from December 15, 1938.

Syllabus

EASTMAN KODAK COMPANY v. THE UNITED STATES

[No. 45502. Decided February 1, 1943]

On Defendant's Motion to Dismiss

Income tax; credit to domestic corporation for foreign tax paid by foreign subsidiary; computation in accordance with valid regulation of Commissioner of Internal Revenue although years involved are prior to adoption of such regulation.—Where until 1931 a taxpayer had been permitted to take credit for foreign taxes paid according to the formula insisted upon by plaintiff in the instant case; and where in said year the Commissioner of Internal Revenue changed the formula; and where the Commissioner's method of computing the foreign tax credit according to the later formula has been held by the Court of Claims and by the Supreme Court (*American Chicle Company* v. *United States*, 94 C. Cls. 699; affirmed 316 U. S. 450) to be in conformity with the statute (49 Stat. 791, 829); it is *held* that plaintiff is not entitled to recover although the years involved were prior to adoption of the later formula, and defendant's motion to dismiss plaintiff's petition must be sustained.

Same.—Where the years involved in plaintiff's claim for refund of taxes, based on the formula for credit for foreign taxes then approved by the Commissioner, were years prior to the change in practice made by the Commissioner, which changed practice was subsequently sustained by the courts as in conformity with the applicable statute; it is *held* that the Commissioner's method of computing the foreign tax credit, as approved by the courts, must be followed in all cases to which the statute applies, whether the year in question was before or after the change in practice. *Helvering* v. *Reynolds*, 313 U. S. 428, cited; *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, distinguished.

Same; power of Commissioner with respect to tax regulations.—The Commissioner of Internal Revenue has power to make regulations which have the force and effect of law if they are within the general scope of the tax statute and are addressed to and reasonably adapted to its enforcement but the Commissioner has no power to extend or limit a statute or modify its meaning. *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571, and other cases cited.

Same.—An interpretative regulation construing a tax statute has validity only if correct. *United States* v. *Harrison Johnston*, 124 U. S. 236, and other cases cited.

Same; presumption of Congressional knowledge concerning tax forms and regulations.—Where during the years involved in the instant case there was no regulation governing the computation of the credit for foreign taxes; and where only the income tax forms provided for the computation of such credit according to the method followed by plaintiff and such had been the administrative practice; and where there is nothing to show that Congress had knowledge of these facts when in 1928 Congress reenacted the applicable portion of the 1926 Revenue Act; it is *held* there is no presumption that Congress knew of such practice and approved it, since such presumption does not arise unless the practice has been long continued. *Higgins* v. *Commissioner*, 312 U. S. 212.

Same.—Congress may be said to know legislatively of the regulations promulgated under prior acts but it is not charged with knowledge of the many forms issued from time to time and of unpublished methods of computation, especially when they have existed for only a brief period.

Mr. James S. Y. Ivins for the plaintiff. *Mr. Richard B. Barker* and *Ivins, Phillips, Graves & Barker* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case involves the question of the credit to which a taxpayer is entitled for foreign taxes paid by its foreign subsidiary.

Until 1931 a taxpayer had been permitted to take credit for foreign taxes paid computed according to the formula insisted upon by plaintiff, but in that year the Commissioner changed the formula to that applied in this case. The same question was presented in *American Chicle Company* v. *United States*, 94 C. Cls. 699, 316 U. S. 450, except that the years involved in that case were after the change in practice, and the years here involved were prior thereto. In that case both this court and the Supreme Court held the foreign tax credit should be computed according to the later formula.

The plaintiff says, however, that this may not be done where the years involved were prior to the change in practice. It says the credit must be computed according to the practice in force at the time the right to the credit accrued.

This is necessarily based on the premise that the regulations make the law; but this is not always true. The Commissioner has power to make regulations which have the force and effect of law if they are within the general scope of the Act and are addressed to and are reasonably adapted to its enforcement, but he has no power to extend or limit a statute or modify its meaning. *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *International Railway Co.* v. *Davidson*, 257 U. S. 506, 514.

The regulation involved here was not adopted pursuant to a power conferred on the Commissioner to supply some legislative detail within the general scope of the Act, but was an interpretation of the meaning of the statute. Such a regulation no more makes the law than does a decision of this court. It is the statute that makes the law, and the statute always means the same thing, however the Commissioner or the courts may construe it. It necessarily follows that an interpretative regulation has validity only if correct. *United States* v. *Harrison Johnston*, 124 U. S. 236; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Graham*, 110 U. S. 219, 221; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615.

The sole question here, then, is whether or not the statute was properly construed in this case, whether or not previously it had been construed another way. Both this court and the Supreme Court have held proper the construction put on it. *American Chicle Co.* v. *United States*, *supra*.

This is not contrary to the opinion of the Supreme Court in *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110. The court was there dealing with a regulation, not a practice. It was held to be binding because of repeated reenactment of the statute construed. This was held to be legislative approval of the existing regulation, which gave it the force of law, and that Congress did not intend to give the Secretary of the

Treasury the right to repeal existing law, by changing his construction of the statute, and make that repeal retroactive.

This is not the case before us. During the years with which we are concerned here there was no regulation governing the computation of the credit for foreign taxes. The income-tax forms, it is true, provided for its computation in the way for which plaintiff contends, and such had been the administrative practice, but there is nothing to show that Congress had knowledge of these facts when in 1928 it reenacted this portion of the 1926 Act. (49 Stat. 791, 829.) The Congress may be said to legislatively know of the regulations promulgated under prior Acts, but it is not charged with knowledge of the many forms issued from time to time and of unpublished methods of computation, especially where they have existed for only a brief period. *Higgins* v. *Commissioner*, 312 U. S. 212.

In the *Reynolds Tobacco Co.* case the regulation had been in force for many years and the legislation had been many times reenacted; here the practice was not sanctioned by regulation and it had been in force but two years since the passage of the 1926 Act, and the provision was reenacted but once. In such circumstances there is no presumption that Congress knew of the practice and approved it. Such a presumption does not arise unless the practice has been long continued. *Higgins* v. *Commissioner*, *supra; Casey* v. *Sterling Cider Co.*, 294 Fed. 426.

We think the case at bar is controlled by *Helvering* v. *Reynolds*, 313 U. S. 428. That case involved the computation of the gain from the sale of securities acquired by bequest. The statute provided that the basis therefor should be the fair market value "at the time of such acquisition." The taxpayer's father died in 1918 leaving to him a contingent remainder in the securities, which ripened into possession on April 4, 1934.

Not until February 11, 1935, did the Treasury promulgate regulations construing the phrase "at the time of such acquisition"; but for a long time prior thereto in certain office decisions the Treasury had held that a beneficiary had not acquired the property so long as his interest was merely contingent, and there had been decisions of the lower courts to

the same effect. In 1935 the Treasury changed its view and promulgated a regulation holding the beneficiary acquired the property at the death of the testator, even though his interest was then contingent. The taxpayer insisted that this regulation could not apply to his transaction because promulgated thereafter, and that the date of his acquisition of the property must be determined according to the decisions of the Treasury and of the courts in force at the time of his father's death.

The Supreme Court rejected this contention. It said the prior rulings had not become so imbedded in the law that only Congress could change them, but that the administrative agency might do so, and if its later interpretation was correct, it would apply to past transactions as well as to future ones.

This is the case here. The Commissioner's method of computing the foreign tax credit has been held by this court and by the Supreme Court to be in conformity with the statute. It, therefore, must be followed in all cases to which the statute applies, whether the year in question was before or after the change in practice.

It results that defendant's motion to dismiss must be sustained and plaintiff's petition dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

In this case (No. 45502) subsequent to the above decision, the plaintiff filed a motion to reconsider the order of February 1, 1943, dismissing the plaintiff's petition and "to refer the case to a commissioner of the court for the purpose of finding the facts with respect to an issue involved in the case that has not been considered on its merits by the Court"; said issue being whether the "plaintiff's credit for foreign taxes paid by its foreign subsidiaries involves the payment of foreign taxes by numerous foreign subsidiaries" the stock of which was owned in part directly and in part indirectly by plaintiff.

On March 1, 1943, plaintiff's motion to reconsider the order of February 1, 1943, was allowed; and on May 3,

1943, defendant's motion to suspend further proceedings, pending negotiations for settlement, was allowed.

Subsequently plaintiff filed a motion to dismiss the action, "the claim of plaintiff having been administratively settled," which motion was allowed, defendant consenting, and the petition was dismissed July 28, 1943.

EDWARD E. GILLEN COMPANY, A WISCONSIN CORPORATION, v. THE UNITED STATES

[No. 44407. Decided June 7, 1943]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act.—Where there were in operation all the forces which ordinarily produce a demand for wage increases, including low hourly wages, short hours, other jobs more available, and it was not possible for plaintiff to recruit and keep a force of carpenters for the wages paid; and where plaintiff had not agreed, pursuant to the National Industrial Recovery Administration Act, to raise wages, and plaintiff had not signed the President's Reemployment Agreement; it is *held* that the existence of the Recovery Act was not a factor in producing the increase of carpenters' wages by plaintiff in the sense required by the Act of June 25, 1938. See *Dravo Corporation* v. *United States*, 93 C. Cls. 734, 738.

Same.—Where in August 1933 plaintiff's supervisors recommended an increase in wages of common laborers, which plaintiff did not then approve; and where in September plaintiff signed the President's Reemployment Agreement, under which it was obligated to make wage increases, and immediately did so; it is *held* that such wage increase of common laborers was the result of the Recovery Act and plaintiff is entitled to recover under the provisions of the Act of June 25, 1938.

Same; motive.—The motive for adherence to the National Industrial Recovery Administration Act or the President's Reemployment Agreement is not a factor in recovery under the Act of June 25, 1938.

The Reporter's statement of the case:

Mr. Martin R. Paulsen for plaintiff. *Mr. Van B. Wake* and *Messrs. Shaw, Muskat & Paulsen* were on the briefs.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. At all times mentioned herein, the plaintiff was a Wisconsin corporation with its principal place of business at Milwaukee, and it was engaged as a contractor in the construction of marine works of improvement, foundations, and like heavy structures.

2. December 19, 1932, plaintiff entered into a written contract with defendant for the construction of Lock No. 5 and an auxiliary lock on and adjoining the west bank of the Mississippi River near Minneiska, Minnesota, and about thirteen miles north of Winona, Minnesota, for the sum of $783,528.17. Plaintiff commenced work about April 21, 1933, and completed the job on or about March 7, 1934.

3. The contract was executed and performed in the name of plaintiff, but was actually performed by the combined organizations of plaintiff and the S. M. Siesel Company, a Wisconsin corporation, pursuant to an agreement between the two companies dated January 9, 1933, which provided that each of the companies would perform certain work and the two companies would share equally in the net profits or losses.

4. Prior to the beginning of this suit, plaintiff had filed another suit involving another issue arising out of the same contract. In that suit this court allowed recovery of $102,-841.08, *Edward E. Gillen Company* v. *United States*, 88 C. Cls. 347.

5. The contract was subject to the provision of the Emergency Relief and Construction Act of 1932 which provided that no individual would be permitted to work more than thirty hours in any one week except on the written decision of the contracting officer that such limitation on the hours of employment was not practical. Nonunion men were employed on this contract, such men being obtained largely from the relief rolls in that area, particularly from the town of Winona, which furnished free transportation to these individuals from the town to the site of the work.

6. Plaintiff was given certain exemptions from the thirty-hour week provision referred to in the preceding finding, including permission to work nights and Sundays, and to

work foremen and operators of expensive motor equipment fifty-six hours per week. Of the employees who were not exempt from the provisions of that act, the carpenters worked seven days of four hours each and the unskilled or common laborers three consecutive days of eight hours and a fourth of four hours; that is, twenty-eight hours per week in the cases of both classes of employees. Prior to August 16, 1933, plaintiff paid its regular carpenters 50 cents per hour, and prior to September 16, 1933, it paid its common laborers 35 cents per hour. Due to the depression, labor was plentiful at that time, but the amount which an employee could earn at these rates for the hours the employee was permitted by the Government to work on this project was inadequate as a living wage. Prior to the dates mentioned above, a small number of carpenters and common laborers were paid somewhat higher wages as "lead men" or "pushers," or because of more than average skill.

7. The hourly rate of wages paid carpenters and common laborers by contractors in Wisconsin and Minnesota during August 1933 varied greatly, in some instances being the same or lower than what was being paid by plaintiff and in other instances, particularly in larger centers of population, higher. Plaintiff's carpenters and common laborers were expressing dissatisfaction at that time with their wages and there was a general feeling of resentment against the low hourly wages and the low weekly earnings. Because of this dissatisfaction and the irregular hours worked, there was a large labor turn-over on this job. Many employees would work for a few days and would not return, with the result that inexperienced workmen had to be brought on the job to replace those who left, with the consequent slowing up of the work. This was more serious among the carpenters than among the common laborers, the former group being a higher grade of workmen and it being more important to obtain and retain qualified men for carpenter work.

The construction superintendent discussed the situation with plaintiff's vice president and recommended that the carpenters' wages be raised with the view of seeing whether better carpenters could be obtained and kept on the job.

The construction superintendent also recommended that the wages of common laborers be increased in order to reduce the large labor turn-over among that class of employees. Similar recommendations were made by the assistant superintendent. While the carpenters and common laborers expressed their dissatisfaction with their wages to the construction superintendent and assistant superintendent and asked for increases, in making such requests they did not make reference to the National Industrial Recovery Act, which was enacted June 16, 1933, or the President's Reemployment Agreement, which was promulgated July 27, 1933, pursuant to the Act. To what extent, if any, the carpenters and laborers were, in their discontent with their wages, influenced by the statute and proclamation is not shown. Plaintiff's vice president agreed that the recommended increase for carpenters might be tried out for two or three weeks in order to determine whether it would prove beneficial to plaintiff.

8. Shortly after the promulgation of the President's Reemployment Agreement, plaintiff's vice president made a trip to the site of the job and while there observed the unrest and dissatisfaction which existed among plaintiff's employees. Upon his return to Milwaukee, he discussed the labor situation at the job with other officers of plaintiff and with officers of the S. M. Siesel Company and as a result it was decided to increase the wages of carpenters from 50 cents to 60 cents per hour in order to prevent the loss of some of the valuable men. An increase for the common laborers was also discussed at the same time but no definite decision to make such an increase was arrived at. Plaintiff at that time regarded its common-labor force as very inefficient, and thought that, even though the wages were low, plaintiff was not getting its money's worth in performance. Further decision as to a wage increase for common labor was deferred until by elimination and better organization a more efficient force could be secured.

At the time of the occurrence of the events referred to in the preceding paragraph plaintiff's officers and the officers of the Siesel Company were cognizant of the National Industrial Recovery Act and the President's Reemployment Agreement, but it has not been proved that either the Act,

or the Agreement, which they did not sign until more than a month later, was a substantial factor in producing the decision to increase the carpenters' wages.

9. Pursuant to the decision referred to in the preceding finding, on August 16, 1933, plaintiff increased the wage rate of its regular carpenters from 50 cents to 60 cents per hour, and thereafter continued to pay that wage scale for this class of employees until the contract was fully performed.

The increased wage scale applied not only to carpenters who were then employed by plaintiff but also to carpenters who were subsequently employed. The following tabulation shows the increase in cost by reason of such increase in the wage scale divided between those carpenters who were employed by plaintiff at the time of the increase and those who were thereafter employed, and including workmen's compensation and public liability insurance:

Employed at 50 cents and increased to 60 cents, 35,556.5 hours @ 10 cents	$3, 555. 65	
Workmen's compensation and public liability insurance @ $9.872 per hundred	351. 01	
		$3, 906. 66
Employed at 60 cents, 41,904 hours @ 10 cents	4, 190. 40	
Workmen's compensation and public liability insurance @ $9.872 per hundred	413. 68	
		4, 604. 08
Total		8, 510. 74

As will hereinafter appear, plaintiff did not sign the President's Reemployment Agreement until September 19, 1933. The amount of the foregoing increased cost for the two classes of carpenters referred to which arose prior to September 19, 1933, was as follows:

Group employed at 50 cents	$1, 513. 25
Workmen's compensation and public liability insurance	149. 39
Total	1, 662. 64
Group employed at 60 cents	590. 75
Workmen's compensation and public liability insurance	58. 32
Total	649. 07

10. On or about the day plaintiff signed the President's Reemployment Agreement on September 19, 1933, plaintiff increased the wages of its common laborers from 35 cents to 40 cents per hour, the increase being made retroactive to September 16. The amount of the increased cost resulting from that increase in the wage scale segregated and computed in a manner similar to that for the carpenters was as follows:

Employed at 35 cents and increased to 40 cents, 97,892 hours @ 5 cents	$4,894.60	
Workmen's compensation and public liability insurance @ $10.04 per hundred	491.42	
		$5,386.02
Employed at 40 cents, 59,740 hours @ 5 cents	2,987.00	
Workmen's compensation and public liability insurance @ $10.04 per hundred	299.89	
		3,286.89
Total		8,672.91

Included in the increases set out in this finding and the preceding finding were amounts of $420.26 and $30.05 which had previously been recovered in the judgment entered in *Edward E. Gillen Co.* v. *United States*, *supra*. One-third of the total of these amounts is attributable to the laborers and two-thirds to the carpenters, i. e., a total of $150.10 to the laborers, and $300.21 to the carpenters.

The fact that plaintiff had signed the President's Reemployment Agreement, and had therein agreed to pay a wage of at least 40 cents per hour for common labor was a substantial and important factor in causing plaintiff to increase the wages of its common laborers.

11. August 19, 1933, the defendant's district engineer on this job inquired of plaintiff whether it had signed the President's Reemployment Agreement. August 31, 1933, plaintiff advised the district engineer in part as follows:

> This Company has not signed the President's Reemployment Agreement. A moment's reflection will demonstrate that, with the obligations incident to the construction of Lock No. 5 on its hands, this Company cannot assume the burdens imposed by paragraph 12 of the President's Reemployment Agreement without jeop-

ardizing its ability to carry the work to completion as well as its very existence.

In order to determine the amount of our bid, it was necessary to secure commitments from suppliers. The amount of our bid was directly influenced by their engagements. We cannot voluntarily expose ourselves to being caught between the devil of suppliers' importunities for increased prices under paragraph 12 and the deep blue sea of our contract price.

Any subscription to the President's Reemployment Agreement by this Company must necessarily be limited so as to exclude its activities in connection with Lock No. 5 unless the Government assumes in advance to reimburse the Company for the increases which by adherence to the President's Reemployment Agreement it would voluntarily make to suppliers.

In view of the above conditions which are necessarily controlling, we have not determined the exact amount by which our cost would be increased further than to ascertain that it would be of such magnitude that this Company cannot assume to make the increase taking its chance on possible reimbursement.

Paragraph 12 of the President's Reemployment Agreement, referred to in the above communication, read as follows:

(12) Where, before June 16, 1933, the undersigned had contracted to purchase goods at a fixed price for delivery during the period of this agreement, the undersigned will make an appropriate adjustment of said fixed price to meet any increase in cost caused by the seller having signed this President's Reemployment Agreement or having become bound by any Code of Fair Competition approved by the President.

12. September 19, 1933, plaintiff signed the President's Reemployment Agreement with the reservation—

To the extent of N. R. A., consent as announced, we have complied with the President's Reemployment Agreement by complying with the substituted provisions of the Code submitted for the Construction (Industry).

The foregoing reservation was permitted by the National Recovery Administration. On the same day plaintiff signed the Reemployment Agreement, it advised the district engineer as follows:

This is to notify you that the Edward E. Gillen Co. signed the President's Reemployment Agreement as of this date, subject to the "Petition to the Administrator for N. R. A. Consent to the Substitution of Paragraphs 3, 4, and 9 of a Code of Fair Competition for the Construction Industry for Paragraphs 2, 3, 4, 5, 6, and 12 of the President's Reemployment Agreement," which Petition has the approval of Stephen F. Voorhees, Chairman of the Code Committee of the Construction League of the United States; approved by F. A. Finch, Industrial Adviser, W. J. Woolston, Labor Adviser; approved as to form by K. Johnston, Legal Division, by Ray D. Smith, for and in the absence of T. S. Hammond, and by Hugh S. Johnson.

We are writing you at this time so that there will be no question of our right to bid under N. R. A. on any of the work that is presently to be let on the Mississippi River in your District.

The President's Reemployment Agreement appears in the record as plaintiff's Exhibit 16 and is incorporated herein by reference. Annexed to the agreement was the following statement by the President:

1. This agreement is part of a nation-wide plan to raise wages, create employment, and thus increase purchasing power and restore business. That plan depends wholly on united action by all employers. For this reason I ask you, as an employer, to do your part by signing.

2. If it turns out that the general agreement bears unfairly on any group of employers they can have that straightened out by presenting promptly their proposed Code of Fair Competition.

The S. M. Siesel Company did not sign the President's Reemployment Agreement. The codes of fair competition applicable to this job became effective sometime during 1934.

13. Plaintiff's employees and their rates of pay on August 29, 1933, were as follows:

Foremen	80¢–$1.25 per hr. and $25–$70 per wk.
Engineers	50¢–$1.00 per hr.
Carpenters	60¢ per hr.
Electricians	50¢ per hr.
Welders	50¢ per hr.
Teamsters	50¢ per hr.

Subforemen	35¢–80¢ per hr.
Piledriver men	70¢ per hr.
Watchmen	35¢ per hr.
Boatmen	75¢ per hr.
Toolroom checkers	35¢ per hr.
Firemen	35¢–50¢ per hr.
Laborers	35¢ per hr.
Cement finishers	50¢–80¢ per hr.
Power-saw operator	60¢ per hr.
Iron workers	60¢ per hr.
Rein. steel men	60¢ per hr.

Prior to that time, as shown in finding 9, the wages of the regular carpenters had been increased from 50 cents to 60 cents per hour and the wages of the common laborers were thereafter increased from 35 cents to 40 cents per hour as shown in finding 10. No changes were made in the wages of the other employees.

14. November 22, 1934, plaintiff filed with the War Department a claim under Public Act 369, approved June 16, 1934, for increased costs in the amount of $19,125.61 incurred as a result of compliance with the National Industrial Recovery Act. The War Department recommended the disallowance of the claim on the ground that the increases in the wages of carpenters and laborers were effected prior to the date the plaintiff signed the President's Reemployment Agreement and prior to the effective dates of the applicable codes, and therefore the increases were not the result of signing the agreement or of compliance with applicable codes of fair competition. The claim was disallowed by the Comptroller General October 29, 1935, for reasons similar to those contained in the recommendation of the War Department.

15. The increased costs, produced by the increase in the wages of carpenters set out in finding 9, were not a result of the enactment of the National Industrial Recovery Act.

The increased costs produced by the increase in the wages of common laborers, set out in finding 10, were a result of the enactment of the National Industrial Recovery Act. They amounted to $8,672.91, from which should be subtracted $150.10, which was recovered in plaintiff's other case, referred to in finding 10, which leaves a balance of $8,522.81.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues, under the Act of June 25, 1938, 52 Stat. 1197, to recover for increased costs incurred as a result of the enactment of the National Industrial Recovery Act. Plaintiff, on December 19, 1932, contracted with the Government to construct Lock No. 5 on the Mississippi River. Work was begun about April 21, 1933, and completed about March 7, 1934. The S. M. Siesel Company was associated with plaintiff in the performance of the contract, doing a part of the work and sharing the costs, and having a right to share in the profits, if any.

The National Industrial Recovery Act became effective on June 16, 1933, and the President's Reemployment Agreement was promulgated on July 27, 1933. Plaintiff was paying 35 cents per hour for common labor and 50 cents for carpenter work. By its contract it had agreed to limit the workweek of its employees, with some exceptions not pertinent here, to thirty hours. In fact the carpenters and common laborers worked only twenty-eight hours per week, because it was more practicable to schedule twenty-eight than thirty hours. The weekly pay checks were consequently small, and the men were dissatisfied and took other better paying jobs if they could get them, creating an unusually large turnover in the force, with resulting loss of efficiency.

Plaintiff's vice president visited the job early in August, 1933. Plaintiff's supervisors at the job discussed the dissatisfaction and large turnover and inefficiency with him and recommended increases in the wages of carpenters and common laborers. Neither the workmen in their complaints to the supervisors, nor the supervisors in their discussion with the vice president referred to the Recovery Act as a reason for increasing wages. When the vice president returned to the home office, the officials there decided to raise the wages of carpenters to 60 cents. A raise for the common laborers was also discussed, but was not decided upon, plaintiff's officials thinking that the common labor was so inefficient, and so inefficiently managed that it wasn't worth even the 35 cents per hour it was getting.

The increase to the carpenters was put into effect on August 16, 1933. On August 19, the Government's district engineer wrote plaintiff inquiring whether plaintiff had signed the President's Reemployment Agreement. Plaintiff replied that it had not, and could not, at the price it had bid for the contract, agree, as paragraph 12 of the Reemployment Agreement required, to make an adjustment in price to those who had contracted with it to furnish materials at agreed prices. The Recovery Administration later gave its consent to plaintiff's signing the Reemployment Agreement with a reservation under which plaintiff was not obligated to make increases in the prices of its materials, and on September 19, 1933, plaintiff signed the Reemployment Agreement with that reservation. On or about the same day plaintiff increased the wages of its common laborers from 35 to 40 cents per hour, making the increase retroactive to September 16, the beginning of the current pay-roll period.

We think that the wage increase to the carpenters was not, and the increase to the common laborers was, a result of the enactment of the Recovery Act, within the meaning of the Act of June 25, 1938. At the time the carpenters' increase was given, there were in operation all the forces which ordinarily produce wage increases. The hourly wages were low, the hours were short, not as a result of the Recovery Act, other jobs were becoming available, and it was not possible to recruit and keep a force of carpenters for the pay they were getting. Plaintiff had not agreed, pursuant to the Recovery Act, to raise wages, and after this raise was given, plaintiff wrote that it could not sign the Reemployment Agreement as it was then written, and it did not sign it until a month later, when it had obtained consent to an important modification. In these circumstances, we think that the existence of the Recovery Act was not a factor in producing the raise, in the sense required by the Act of June 25, 1938. See *Dravo Corporation* v. *United States*, 93 C. Cls. 734, 758.

The raise to the common laborers was, we think, the result of the Recovery Act. When, in August, plaintiff's supervisors recommended the raise, and gave their reasons for it, viz, that it would produce a more efficient and economical

job, plaintiff's executives were not persuaded, and did not give the raise. When, in September, plaintiff signed the Reemployment Agreement under which it was obligated to give the raise, it immediately did so. One of its principal motives for signing the Reemployment Agreement may have been to make itself eligible to bid on future Government work. If so, that is no obstacle to its recovery here. If the wage raise was the result of the Recovery Act, we are not interested in what induced plaintiff's adherence to the Recovery Act.

Plaintiff is entitled to recover $8,522.81. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

GRACE JONES STEWART, EXECUTRIX OF THE ESTATE OF MELODIA B. JONES, DECEASED v. THE UNITED STATES

[No. 44732. Decided June 7, 1943]

On Defendant's Plea In Bar

Income tax; claim for refund insufficient.—A claim for refund which fails to give to the Commissioner notice of the nature of the claim for which suit is to be brought and refers to no facts upon which such suit may be founded does not satisfy the conditions of the statute. (Internal Revenue Code, section 3772.) *United States* v. *Felt & Tarrant*, 283 U. S. 269, cited.

Same; claim for refund a prerequisite to suit.—The filing of a claim for refund is an indispensable prerequisite to a suit to recover taxes, under the provisions of the statute (Internal Revenue code, section 3772), and the claim for refund specified by that provision relates to the claim which may be asserted in a subsequent suit.

Same; allegations of claim inadequate.—Where in the instant case the general statement "installment obligations constituted capital" was contained in a claim for refund without any allegation of facts upon which such general statement was founded and without anything which would suggest the nature of the claim as consistent with the claim in suit; it is *held* that such allegations are not adequate to support the basis of the instant suit.

Same; request for revaluation of assets not definite.—Where the principal purpose of plaintiff's claim for refund was to dispute what appeared to be double taxation of decedent's assets at the date of her death, that is, including the value of installment obligations in decedent's gross estate as a part of the corpus for estate tax and also including the value of the same assets in decedent's gross income in her final income tax return; and where the profit from the installment sale in question had been previously determined by the commissioner, during the life of plaintiff's decedent; it is *held* that the language of the claim in suit is too general, indefinite and unsupported by details to have put the Commissioner on notice that plaintiff desired the assets involved to be revalued. Cf. *Provident Trust Company of Philadelphia* v. *Commissioner*, 76 Fed. (2d) 810; *Moore, Extrx.* v. *United States*, 80 C. Cls. 842, certiorari denied 296 U. S. 583.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff. *Mr. Oscar P. Mast* on answer to plea in bar.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Grace Jones Stewart, is the daughter of Melodia B. Jones, who died March 11, 1931 (hereinafter sometimes referred to as the "decedent"), and brings this suit as executrix of her mother's estate.

2. September 15, 1927, the decedent filed her individual income-tax return for the calendar year 1926 in which she reported a net income of $320,052.87 and a resulting tax of $99,727.33. In computing her tax liability the decedent included tax on capital net gain in the amount of $43,764.84. The capital net gain was based in part on the sale by her during the year 1926 of certain oil properties at a price of $3,200,000. A part of these oil properties had been acquired by the decedent under the will of her husband, who died December 6, 1916, and the balance between that date and the date of the sale in 1926, but all of the property had been acquired more than two years prior to 1926.

In determining the profit on the sale, the decedent used as the net cost or value of the properties $297,670.86, and com-

puted a net profit to be realized of $2,902,329.14. A cash payment of $500,000 was made at the date of the sale and the balance was payable in installments over succeeding years. The decedent did not report as income for 1926 the entire difference between the selling price, $3,200,000, and the net cost or value as determined by her of the properties at the date of sale, $297,670.86, but elected to return the profit on the installment basis under the provisions of section 212 (d) of the revenue act of 1926. On that basis she returned a profit for 1926 of $453,500 on account of the cash payment received in that year of $500,000.

3. December 16, 1930, after an examination by a revenue agent, the Commissioner sent the decedent a sixty-day deficiency letter advising her of his determination of deficiencies in her income taxes for the years 1926 and 1928 in the total amount of $83,450.40 and of an overassessment for 1927 of $7,532.54. That letter advised the decedent of her right to appeal to the United States Board of Tax Appeals for a redetermination of her tax liability for the years for which deficiencies were disclosed. The deficiency for the year 1926 was based in part upon a reduction by the Commissioner of the valuation or cost of the oil properties in connection with the sale referred to in the preceding finding from $297,670.86, as used by the decedent in her return, to $104,755. That reduction in the value of the properties increased the net profit to be realized from $2,902,329.14, as shown in the return, to $3,095,245, and increased the net profit to be returned on the installment basis for 1926 from $453,500 to $483,632, that is, additional profit to be reported in 1926 of $30,132.

4. March 11, 1932, plaintiff as executrix filed an individual income-tax return for the decedent for the period January 1, 1931, to March 11, 1931, the date of decedent's death. That return disclosed a net income of $28,241.10 and a tax liability of $766.85 which amount was paid March 18, 1932. Following an examination of decedent's books and records by a revenue agent in connection with that return, the plaintiff was advised by letter dated February 13, 1934, from the revenue agent in charge of a proposed deficiency in tax for

the period January 1 to March 11, 1931, in the amount of $587,597.88. That deficiency was due in part to the inclusion in the decedent's gross income for that period of $2,369,796.80 representing the value of the installment obligations at the decedent's death from the sale heretofore referred to of oil properties remaining unpaid at that time. In computing that deficiency, the revenue agent in charge included the $2,369,796.80 in decedent's gross income as ordinary income and not as capital gain although all of the assets had been held by the decedent for more than two years prior to the date of the sale in 1926.

5. February 17, 1934, plaintiff filed a waiver extending the period for the assessment of the decedent's income taxes for the period January 1, 1931, to March 11, 1931, to June 30, 1935, and that waiver was signed by the Commissioner of Internal Revenue February 26, 1934.

6. February 20, 1934, plaintiff filed a protest against and exceptions to the report of the revenue agent referred to in finding 4 which read as follows:

> I hereby make and file protest against and exceptions to the report, findings, and recommendations of the Internal Revenue Agent in Charge, dated January 26, 1934, with respect to the income tax liability of the above-named taxpayer for the period January 1, 1931, to March 11, 1931, as follows:
>
> 1. Exception is taken to the finding in said report of additional income in the amount of $2,369,796.80, by reason of the application of section 44 (d), Revenue Act of 1928, on the ground that such finding is erroneous as matter of fact and as matter of law and on the ground that said section 44 (d) has no application to the transmission of installment obligations by death, and that if section 44 (d) be construed to apply to the transmission of installment obligations by death, the section is in violation of the Fifth and Sixteenth Amendments to the Constitution of the United States, and is void and of no force or effect.
>
> 2. Exception is taken to the finding in said report that the said claimed additional income should be taxed as ordinary income instead of capital gain on the ground that such finding is erroneous as matter of fact and as matter of law, and contrary to the determination of the Board of Tax Appeals in the case of Estate of Owen Osborne, 29 B. T. A. 70.

3. Exception is taken to the proposed assessment of an additional tax in the amount of $587,597.88, or in any amount, for the reasons and on the grounds hereinbefore set forth.

In connection with the assessment of the proposed deficiency, I wish to call to your attention the circumstance that the decisions of the Board of Tax Appeals in the cases of Estate of Owen Osborne, 29 B. T. A. 70, and Erskine M. Ross, 29 B. T. A. 44, relied on in the aforesaid report as authority for the proposed assessment under section 44 (d) are, I am informed, in process of appeal in the United States Courts. Since the final decision in those cases will govern the question of the taxability or nontaxability of the taxpayer in this case, I beg to request that, pursuant to the consent extending the period of limitation upon assessment to June 30, 1935, which I have signed and filed, the sending of a notice of deficiency in this case be withheld during that period until the final judicial determination of the questions presented in the Osborne and the Ross cases.

7. March 7, 1935, plaintiff, as executrix of the Estate of Melodia B. Jones, filed a claim for refund of estate taxes in the amount of $129,560.93. That claim asserted, among other things, the following grounds therefor:

The amount of $8,952,646.31 determined to be the value of decedent's net estate by the final audit is excessive due to the failure to reduce the value of the mortgage executed by Forest Oil Corporation on July 15, 1926, by $132,185.04, the amount which deponent permitted the Forest Oil Corporation to deduct from its obligations under said mortgage because of shortage of acreage, failure of warranty of title, etc., the details of which more fully appear in the rider in re Estate of Melodia B. Jones hereto attached and made a part hereof. Deponent therefore claims that the value of said mortgage as reflected by the final audit should be reduced by the amount of $132,185.04. Deponent also claims that in the event it is finally determined that the unpaid balance of said mortgage at the date of decedent's death is to be added as taxable income to the return for the period January 1, 1931, to March 11, 1931, under the provisions of section 44 (d), Revenue Act of 1928, the net estate should be reduced by the amount of income tax so determined to be due, the details of which said claim are more fully set out in said rider hereto attached and made a part hereof.

8. May 3, 1935, the Bureau of Internal Revenue notified plaintiff that after review of the report of the revenue agent referred to in finding 4 a deficiency in the income tax liability of the decedent for the period January 1 to March 11, 1931, had been determined in the amount of $295,800.73 instead of the deficiency of $587,597.88 determined by the revenue agent. In that determination the Bureau computed the same profit on account of the value of the installment obligations as was used by the revenue agent, $2,369,796.80, but treated it as capital net gain instead of ordinary income in computing the decedent's tax liability for that period. May 14, 1935, plaintiff filed a waiver of restrictions on assessment and collection of the deficiency of $295,800.73 referred to above. On his May 1935 special list, the Commissioner assessed against plaintiff, as executrix of the Estate of Melodia B. Jones, the sum of $295,800.73 together with interest in the amount of $56,299.39 for the period January 1 to March 11, 1931. Following the issuance of notice and demand by the collector dated May 18, 1935, plaintiff on that day paid the total assessment of $352,100.12.

9. March 16, 1937, plaintiff, as executrix of the Estate of Melodia B. Jones, filed a claim for refund for the total amount of income tax which had been paid as shown in the preceding finding and assigned the following grounds therefor:

> Said amount of $352,100.12 was collected from deponent as income tax and interest thereon for the period January 1, 1931, to March 11, 1931 (date of death of decedent), under the provisions of Section 44 (d) of the Revenue Act of 1928, on the theory that taxable income in the amount of $2,369,796.80 was realized by virtue of the transmission at her death of certain unpaid installment obligations owned by decedent. Deponent claims (1) that said Section 44 (d) is unconstitutional; (2) the installment obligations being unpaid at the date of death of the decedent, no taxable income was received or realized by anyone; (3) said installment obligations constituted capital; and (4) the transaction which gave rise to said installment obligations having occurred prior to the enactment of said Section 44 (d), the provisions of said Section cannot be retroactively applied to said transaction; (5) deponent further claims that in

any event said estate is entitled to a refund of approximately $20,000.00 of said amount representing income tax and interest thereon overpaid on said installment obligations because the Commissioner of Internal Revenue overvalued said installment obligations remaining unpaid at the time of decedent's death in the amount of $132,185.04, which has heretofore been admitted by the Commissioner of Internal Revenue in determining the Estate Tax due from the estate of said decedent.

10. May 17, 1937, the Commissioner advised plaintiff of his proposed denial of the first four issues set out in the claim for refund of income tax filed March 16, 1937, and referred to in finding 9, and the allowance of the fifth issue in that claim, such letter reading in part as follows:

Reference is made to your claim for the refund of $352,100.12, individual income taxes for the taxable year ended December 31, 1931.

The basis of the claim is as follows:

1. That section 44 (d) of the Revenue Act is unconstitutional.
2. That the installment obligations being unpaid at the date of death of the decedent, no taxable income was received or realized by anyone.
3. That said installment obligations constituted capital.
4. That the transaction which gave rise to said installment obligations having occurred prior to the enactment of said section 44 (d), the provisions of said section cannot be retroactively applied to said transaction.
5. That the estate is entitled to a refund of approximately $20,000.00 of said amount representing income tax and interest thereon due to a revaluation of the installment obligations remaining unpaid at the time of the decedent's death.

Issue 5 has been conceded.

In connection with issues 1 to 4, inclusive, you are advised that while it is true that the sale in question was made prior to the enactment of the Revenue Act of 1928 still Income Tax Ruling 2515, Cumulative Bulletin IX-1, page 125 (1930) provides as follows:

"The decedent died subsequent to the enactment of the Revenue Act of 1928, owning installment obligations rereceived in connection with the sale of real estate, the profit from which he had elected to return on the installment basis and on which he has reported only a

portion to be realized. Upon his death the installment obligations were transmitted to the executor of his estate.

"Held, the provisions of section 44 (d) of the Revenue Act of 1928 are applicable to the transmission of the installment obligations upon the death of the decedent. The gain or loss resulting from the transmission of the installment obligations, computed in accordance with the method prescribed in the foregoing section, should be included in the decedent's return for the taxable year in which his death occurred."

Your attention is also invited to the decision of the United States Board of Tax Appeals in the case of Alexander M. Crane, 30 Board of Tax Appeals, page 29, affirmed by the United States Circuit Court of Appeals for the Second Circuit, 76 Federal (2d) 99, published as Court Decision 1005, page 200, Cumulative Bulletin XIV-2 (1935). In its decision the Court held that where a taxpayer, who died on April 16, 1930, had sold real estate in 1929, taking payment in cash and a purchase, money, bond and mortgage, and had elected to return the profit therefrom on the installment basis, as allowed by section 44 (b) of the Revenue Act of 1928, the installment obligations were "transmitted" upon the death of the taxpayer, and gain resulted in 1930 to the extent provided by section 44 (d) of the Act. That section is not unconstitutional on the ground that it includes "unrealized" gains as income.

[Then followed a recomputation of plaintiff's tax liability in which effect was given to a reduction of $132,185.04 in the value of the installment obligations at the decedent's death as claimed under the fifth issue of the claim for refund.]

11. May 21, 1937, plaintiff's attorney advised the Commissioner as follows in regard to the action proposed in the Commissioner's letter of May 17, 1937:

In response to your letter dated May 17, 1937 (Bureau Symbols IT: A: 2-KVN) addressed to Mrs. Grace Jones Stewart, Executrix of the Estate of Melodia B. Jones, deceased, you are advised that your action covering Issue 5 of the claim for refund of $352,100.12 filed by said Estate for the period January 1, 1931, to March 11, 1931, reflecting an overassessment of $19,706.78 is satisfactory to the taxpayer. As to Issues 1, 2, 3, and 4 of said claim for refund which you propose to disallow, you are advised that the taxpayer does not desire a hear-

ing, nor to file a brief. Accordingly, you are requested to issue a certificate of overassessment for the amount of $19,706.78 as indicated in your said letter and to issue official notice covering the disallowance of items 1–4, inclusive, in accordance with Section 1103 (a) of the Revenue Act of 1932, at your earliest convenience.

It is noted that your first paragraph states "Reference is made to your claim for the refund of $352,100.12, individual income taxes for the taxable year ended December 31, 1931." This, of course, is in error because the claim for refund covers only the period from January 1, 1931, to March 11, 1931 (the date of death of decedent).

12. May 26, 1937, the Commissioner made the following reply to the letter referred to in the preceding finding:

Receipt is acknowledged of your letter dated May 21, 1937, written in reference to the partial disallowance of the claim for refund filed by the Estate of Melodia B. Jones, deceased, for the taxable year ended December 31, 1931.

You invite attention to the fact that the claim for refund was filed for the period January 1, 1931, to March 11, 1931. In reply you are advised that in accordance with the provisions of article 371, page 114, Regulations 74, the return of the decedent for the year in which she died is a return for twelve months and not for a fractional part of a year. Therefore, the claim for refund is really for the return filed for the taxable year ended December 31, 1931, on which was reported income for the period January 1, 1931, to March 11, 1931.

A certificate of overassessment has been prepared and will reach the executrix through the office of the collector of internal revenue for the district in which the return was filed.

13. Pursuant to his letter of May 17, 1937, referred to in finding 10, the Commissioner issued a certificate of overassessment in favor of the plaintiff showing a total overassessment for the taxable year ended December 31, 1931, of $19,706.88. A part of the overassessment in the amount of $2,333.80 was offset against a proposed deficiency for 1934, and the net overassessment, $17,373.08, with interest of $2,214.47, was paid to plaintiff June 8, 1937.

August 12, 1937, the Commissioner advised plaintiff of his formal rejection of the claim for refund of income tax re-

ferred to in finding 9 to the extent not allowed by the certificate of overassessment referred to above.

14. August 30, 1937, the Commissioner advised plaintiff's representative as follows:

> Reference is made to your call at this office under date of August 30, 1937, at which time you furnished a letter of August 26, 1937, from Mr. J. E. Gordon, 100 Central Park, South, New York, New York, together with enclosures mentioned therein, relative to interest of $2,214.47 computed on the principal of $17,373.08, certificate of overassessment, in favor of the above-named taxpayer for the year 1931.
>
> You are advised that the total overassessment as shown in the body of the certificate is $19,706.88, of which $16,555.83 represents tax and $3,151.05 represents deficiency interest. From this amount $2,333.80 was withheld in connection with proposed deficiency for the year 1934, leaving a net overassessment of $17,373.08. The proportional part of the net overassessment of tax and interest would be $14,595.20 (principal) and $2,777.88 (interest).
>
> The interest of $2,214.47 was computed by this office on the net overassessment of $17,373.08 from May 18, 1935, the date of overpayment, to March 7, 1937, the date preceding the date of the refund check by not more than thirty days as provided by Section 614, Revenue Act of 1928.
>
> With regard to Section 1103-A, Revenue Act of 1932, you are advised that official notice relative to the rejected portion of the claim was sent by registered mail to Mrs. Grace Jones Stewart, Executrix, 100 Central Park, South, New York, New York, under date of August 12, 1937.

September 15, 1937, the Commissioner advised plaintiff's representative further as follows:

> Reference is made to Paragraph 3 of Bureau letter addressed to you under date of August 30, 1937, with regard to interest of $2,214.47 computed on the principal of $17,373.08, certificate of overassessment, Schedule IT: 60433, in favor of the above-named taxpayer for the year 1931, which reads as follows:
>
> "The interest of $2,214.47 was computed by this office on the net overassessment of $17,373.08 from May 18, 1935, the date of overpayment, to March 7, 1937, the date preceding the date of the refund check by not more than thirty days as provided by Section 614, Revenue Act of 1928."

> You are advised that the statement showing interest computed to March 7, 1937 is erroneous. The correct date to which interest was computed is July 3, 1937. Please correct your records accordingly.

15. Pursuant to the subject matter of the letters to plaintiff's representative as set out above, the Commissioner issued a certificate of overassessment in favor of plaintiff for the taxable year ended December 31, 1931, in the amount of $2,333.80. That amount together with interest of $361.20 was credited to a deficiency of plaintiff for the year 1934 on December 17, 1937.

The defendant's plea in bar was sustained and plaintiff's petition was dismissed.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This income tax case comes before the Court on defendant's plea in bar. It raises a single issue, the sufficiency of a claim for refund. In her petition plaintiff seeks recovery on the ground that she should be permitted to revalue certain assets involved in a sale in 1926 for the purpose of reducing the profit derived from such sale. The gravamen of the plea is that the claim for refund did not give the Commissioner notice of any such issue.

The facts upon which the plea is based are not in controversy, and are briefly stated as follows:

In 1926 plaintiff's decedent disposed of certain property for $3,200,000 which had been acquired by her more than two years prior thereto, and received a cash payment thereon of $500,000. She computed a profit on the sale and, in accordance with Section 212 (d) of the Revenue Act of 1926, elected to report the profit on the installment basis, and continued to report in that manner until her death in 1931. After the decedent's death, plaintiff filed an income tax return for the decedent for the period January 1, to March 11, 1931, the date of decedent's death, and in that return did not report any income on account of the installment obligations remaining unpaid at that time. Upon an examination of that return, the Commissioner held that the outstanding installment obligations must be considered as having matured at the decedent's death pursuant to the provisions of Section 44 (d) of the Revenue Act of 1928, and

that, accordingly, any profit on the sale in 1926 which had not previously been accounted for through the installment basis accrued at that time for income tax purposes. As a result of such determination, the Commissioner assessed a deficiency which plaintiff paid May 18, 1935.

March 16, 1937, plaintiff filed the claim for refund which she contends is sufficient as a basis for this suit. It contains five grounds, namely, (1) that Section 44 (d) of the Revenue Act of 1928 is unconstitutional; (2) that since the installment obligations were unpaid at the date of the death of the decedent, no taxable income was received or realized by anyone; (3) that the "installment obligations constituted capital;" (4) that it was improper to give a retroactive effect to Section 44 (d) and make it applicable to a transaction which occurred prior to its enactment; and (5) that in any event the Commissioner had incorrectly valued the installment obligations remaining unpaid at the time of decedent's death. The Commissioner denied the claim as to the first four grounds, but conceded plaintiff's contention as to the fifth ground, and made a refund accordingly.

Plaintiff concedes that items one, two, and four which were denied do not provide a basis for this suit, and that item five was allowed by the Commissioner. Her sole contention is that the allegation under the third item in the claim, "installment obligations constituted capital," properly put the Commissioner on notice that she was claiming a revised cost or value of the assets involved in the 1926 sale. At no time do we find where plaintiff or her decedent questioned the Commissioner's determination of the cost or value of property which was sold. When the Commissioner examined the decedent's returns in 1930 for the years 1926 and 1928, and computed the total profit to be realized from the sale, he fixed a cost or value for this property, and when he came to determine the profit which had not yet been reported on the outstanding installment obligations, he did not disturb his previous determination as to the amount of profit realized on the sale in 1926. The record does not disclose any protest on account of this feature in either determination.

The Commissioner's regulations in force at the time required that—

> The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. [Regulations 86, Art. 322-3.]

The Supreme Court, in passing upon the requirement that a claim for refund must be filed as a prerequisite to a suit, not only upheld a regulation similar to the one just quoted but also stated that "quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. Here we have merely the general statement "installment obligations constituted capital" without any allegation of facts upon which it is founded or anything which would suggest the nature of the claim as consistent with that now contended for by plaintiff.

The contention that the expression in question should receive the interpretation requested by plaintiff by reason of the attitude taken by plaintiff in an earlier protest not only is without merit but also serves to show the opposite. What plaintiff asked in the protest insofar as here material was that the Commissioner withhold his final determination until two cases which had been decided by the Board of Tax Appeals became final through further judicial determinations. In neither of those cases was any question raised which related to the acquisition basis of the assets but rather whether Section 44 (d) was constitutional and whether under that section installment obligations were transmitted at death. The Board held contrary to this plaintiff's position on both issues. One of these decisions became final without appeal and the other was affirmed on appeal. *Provident Trust Company of Philadelphia* v. *Commissioner*, 76 Fed. (2d) 810.

Apparently what plaintiff meant by the words "installment obligations constituted capital" was that at the moment of decedent's death such obligations became corpus or capital assets subject to a Federal estate tax and therefore no taxable

income could be realized from the collection of such obligations except the amount which exceeded their value at decedent's death. Cf. *Moore, Executrix* v. *United States*, 80 C. Cls. 842, certiorari denied 296 U. S. 583. That, however, is very different from using the words as a basis of notice to the Commissioner that plaintiff desired to have redetermined the cost or value of assets which were sold in 1926.

The language of the present claim for refund is too general, indefinite, and unsupported by details to have put the Commissioner on notice that plaintiff desired the assets involved in the sale made in 1926 to be revalued. The profit from this sale had been determined by the Commissioner in 1930, during the life of plaintiff's decedent. No question was raised by the decedent during her life time or plaintiff that this determination was incorrect. After all these years have expired the plaintiff now for the first time seriously contends that the value should have been redetermined by the Commissioner under the general assertion in the refund claim which did not comply with the law or regulations in clearly indicating to the Commissioner that a revaluation of the 1926 assets was desired. It is too late now to make such a claim.

The plea is sustained and the petition is dismissed. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

EDWIN M. BAYLY v. THE UNITED STATES

[No. 45563. Decided June 7, 1943]

On the Proofs

Civil Service retirement; right of claimant to judicial review.—A claimant under the Civil Service Retirement Act (U. S. Code, Title 5, chapter 14) has the right to maintain a suit under the Tucker Act (U. S. Code, Title 28, chapter 7, section 250) to review questions of law decided by the administrative tribunal. *Dismuke* v. *United States*, 297 U. S. 167.

Same; findings of fact.—Where the administrative officer is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized. *Dismuke* v. *United States*, 297 U. S. 167, and cases therein cited.

Same; jurisdiction of the Court of Claims.—The Court of Claims has jurisdiction to decide whether the determination of the Civil Service Commission as to the age of an applicant for retirement is sufficiently supported by evidence and reason to be immune from judicial reversal.

Same.—The court in reviewing the determination of an administrative officer does not make a new and independent determination of the facts but only examines the record which the administrative body had before it, to ascertain whether there was substantial evidence to support the findings made by that body or whether there was some denial of a fair hearing. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142 and cases therein cited; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105.

Same; deductions of Commission fairly supported by evidence.—In the instant case it is *held* that the deductions of the Civil Service Commission from such evidence as the Commission had before it as to the date of birth of plaintiff and his age at retirement were substantially supported by such evidence; and the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Meredith M. Daubin for the plaintiff.

Mr. Wilbur R. Lester, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Edwin M. Bayly, became a classified Civil Service employee in the United States Treasury Department, Bureau of Internal Revenue, October 1, 1917. He held this status until the date of his retirement, September 30, 1939.

2. From the effective date of the Retirement Act, May 22, 1920 (41 Stat. 614), to the date of his retirement, monthly deductions for retirement benefits were withheld from plaintiff's salary. On his retirement, plaintiff filed with the Civil Service Commission his application for a life annuity, using the form provided and giving as his date of birth September 28, 1869.

3. The Civil Service Commission issued to plaintiff a retirement certificate dated November 21, 1939, allowing an annuity of $682.80, which gave plaintiff monthly payments of $56.90. This annuity was computed on the basis of the Commission's finding that plaintiff's date of birth was September 28, 1864, and that plaintiff had therefore reached the retirement age of 70 years on September 28, 1934. The certificate indicated that the monthly installments were to commence as of October 1, 1934, with payment suspended to September 30, 1939, since plaintiff was between those dates employed in a *de facto* status with pay. This annuity was based on 16 11/12 years of allowable service, from 1917 to 1934. The payments of $56.90 per month have been made to plaintiff since October 30, 1939.

4. Plaintiff protested the action of the Civil Service Commission in holding that he was born September 28, 1864, and claimed that the date of his birth was September 28, 1869. The Board of Appeals and Review of the Civil Service Commission sustained the Commission's holding.

5. The basis stated by the Civil Service Commission for its determination of plaintiff's date of birth as September 28, 1864, was information received from the Bureau of the Census as to the census of 1900. In the absence of a birth certificate, baptismal certificate or other church record, family record, or statement of attending physician, none of which were present in this case, the customary procedure of the Civil Service Commission in establishing a date of birth is to look to the report of the Bureau of the Census showing the earliest record of age or date of birth.

The census of 1900 listed one Edwin M. *Bailey*, residing at 834 I Street NE., Washington, D. C., born in New York September 1864, and having a wife Mary C. Bailey. Plaintiff was born in New York and his wife's name is Mary C. Bayly. Plaintiff has never spelled his name other than *Bayly*, and never resided at 834 I Street NE. Plaintiff had, however, lived at or near 834 11 Street NE. He testified at the hearing before a Commissioner of this court that he thought it was 831 11 Street NE.

The census of 1900 listed two other persons as residing

in the 800 block of I Street NE., namely, Frances Strong at 832 and Laura N. McCarty at 834, who according to the city directory, actually resided at 832 and 834 11 Street NE., respectively.

The Census Report of 1910 showed the age of Edwin M. Bayly, of 430 13th Street NE., plaintiff's correct address at that time, as 45, which was consistent with a date of birth of September 1864. The 1920 census showed his age as 57.

6. In addition to the Census Reports, the Civil Service Commission had before it the following evidence:

(*a*) An application by plaintiff to take a Civil Service examination, dated May 28, 1917. On page 2 of this application in the two adjacent spaces asking for date of birth and age on last birthday, Mr. Bayly wrote as follows:

September 28, 1868 48

At the time plaintiff made this application he would have been 48 years old if he had been born in 1868. If he had been born in 1869, as he here contends, his age at the time of this application would have been 47.

(*b*) Two personal history forms, dated June 24, 1918, and March 16, 1919, filled out by Mr. Bayly in his own handwriting. These forms were part of the personnel records of the Bureau of Internal Revenue. On each of these forms, Mr. Bayly gave his date of birth as September 28, 1869.

(*c*) A designation of beneficiary filed with the Civil Service Commission January 23, 1935, in which plaintiff gave his date of birth as September 28, 1869.

(*d*) A photostatic copy of an application made by plaintiff in his own handwriting for membership in the Washington Board of Trade. This application was dated January 3, 1927, and gave plaintiff's date of birth as September 28, 1869.

(e) An affidavit of one George B. Kennedy, former assistant manager and head bookkeeper of the firm of Sanders and Stayman of Washington, D. C. The affidavit stated that Edwin M. Bayly was employed by the firm of Sanders

and Stayman in 1899, that at that time he gave his age as thirty years, that Kennedy was thirty-one years old at the time and that his understanding was that he and Mr. Bayly were about the same age.

7. Unsuccessful efforts to obtain additional information with respect to Mr. Bayly's date of birth were made by Mr. Bayly, by his attorney, and by the Civil Service Commission through the following sources and methods:

(*a*) Department of Health, New York City.

(*b*) Commissioner of Records, New York County.

(*c*) Bureau of Vital Statistics, New York.

(*d*) Clerk, Borough of Queens, New York City.

(*e*) Search for the record of application for or issuance of a marriage license to Mr. Bayly.

(*f*) Search of records of former employers of Mr. Bayly, and

(*g*) Search of records of schools attended by Mr. Bayly.

8. At the hearing before a Commissioner of this court, plaintiff introduced copies of the various records referred to in finding 6. Mr. Kennedy was a witness and his testimony is substantially the same as the statement made in the affidavit. Plaintiff also introduced evidence that he was admitted to Georgetown University Hospital April 12, 1933, for an operation. The record of the hospital gave his age as 63 at the time he was admitted. That age would be consistent with his having been born on September 28, 1869.

9. Plaintiff has never made application for or taken out any life insurance policies, nor joined any lodge association and has no knowledge of the existence of any family Bible or baptismal certificate which would show the date of his birth. He has no recollection of the name of the church in which he was married.

10. The defendant has presented no evidence, either documentary or oral, for the purpose of showing the date of plaintiff's birth. It has presented evidence only for the purpose of showing that the determination of the Civil Service Commission was supported by evidence.

11. There was substantial evidence before the Civil Serv-

ice Commission to support its determination that plaintiff was born September 28, 1864. There is no evidence that its decision was arbitrary or capricious.

12. If the Civil Service Commission had computed plaintiff's annuity on the basis that the date of his birth was, as he alleges, September 28, 1869, an annuity of $927.96, or $77.33 per month and based on 21 11/12 years of service, would have been payable beginning October 1, 1939.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff was a Civil Service employee of the Government from October 1, 1917, until he retired on September 30, 1939. An act making provision for a retirement allowance, or annuity, for such employees, became effective in 1920.[1] The amount of one's annuity depended in part upon the number of years of his service. Retirement at the age of 70 was compulsory, except under circumstances not here present.

The Civil Service Commission issued to plaintiff, upon his retirement, a certificate which computed plaintiff's annuity at $682.80 per year, which amount was based on the Commission's finding that plaintiff was born on September 28, 1864, and had reached the age of seventy in 1934, five years before his actual retirement in 1939. The Commission treated his five years of service from 1934 to 1939 as being only *de facto* service, which he had rendered and for which he had been paid, after he should have been retired, but which did not increase his years of proper service nor the amount of his annuity under the Retirement Act. In short, he was given, upon his retirement in 1939, the same annuity that he would have been given if he had retired in 1934, the year in which, the Commission found, he reached the age of 70 and should have retired.

Plaintiff claims that the Commission's findings as to his age and date of birth were wrong; that he was born on

[1] 41 Stat. 614.

September 28, 1869, and hence did not reach the age of 70 until September 28, 1939; and that all of his service down to that date should have counted to increase his years of service and the amount of his annuity under the Retirement Act. The Government concedes that, if plaintiff's age had been found by the Commission to be as plaintiff contends, his annuity would have been $927.96, instead of the $682.80 which he is receiving.

Our first task is to determine whether we are to decide the question of plaintiff's age, or, on the other hand, are to decide whether the Civil Service Commission's determination of plaintiff's age is sufficiently supported by evidence and reason to be immune from judicial reversal. We think the latter is our role in this controversy.

The Civil Service Retirement Act contains, *inter alia*, the following provisions:

> For the purpose of administration, except as otherwise provided herein, the Civil Service Commission is hereby authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this chapter into full force and effect.[2]
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> * * * * *
>
> Upon receipt of satisfactory evidence the Civil Service Commission shall forthwith adjudicate the claim of the applicant, and if title to annuity be established, a proper certificate shall be issued to the annuitant.[3]

These provisions lodge the power of adjudication in the Commission. There is no legislation expressly authorizing judicial review of the Commission's decision. Plaintiff sues under our general jurisdiction over claims founded upon a law of Congress, the Civil Service Retirement Act. That Act does provide that a Civil Service employee shall have a specified annuity under specified conditions. But it also provides, in the section quoted above, that at least the initial power of adjudication as to whether those conditions

[2] 5 U. S. C. Sec. 709; 41 Stat. 616, 44 Stat. 913, 46 Stat. 478, 46 Stat. 1016, Ex. Ord. 6670, April 7, 1934.
[3] 5 U. S. C. Sec. 717; 41 Stat. 618, 44 Stat. 912, 46 Stat. 477, 46 Stat. 1016, Ex. Ord. 6670, April 7, 1934.

have been fulfilled shall be in the Civil Service Commission. In that situation, the ordinary doctrines relating to judicial review of administrative adjudication are applicable. In *Dismuke v. United States*, 297 U. S. 167, the Supreme Court of the United States held, against the contention of the Government, that a claimant under the Retirement Act had a right to maintain a suit under the Tucker Act to review questions of law decided by the administrative officer, in that case the Commissioner of Pensions. As to judicial review of questions of fact, the court said:

> If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States*, 266 U. S. 221, 225; *United States* v. *Williams*, 278 U. S. 255, 257, 258; *Meadows* v. *United States*, 281 U. S. 271, 274; *Degge* v. *Hitchcock*, 229 U. S. 162, 171; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 330, 331.

This statement is in accord with the decisions of the Supreme Court as to the scope of judicial review of decisions of administrative and quasi judicial boards and commissions. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142, and cases there cited; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105. Under those decisions, the reviewing court does not make a new and independent determination of the facts. It only examines the record which the administrative body had before it, to ascertain whether there was substantial evidence to support the findings made by that body, or whether there was some denial of a fair hearing. We see no reason why our review of the findings of the Civil Service Commission, which has been entrusted by Congress with the task of making the initial determination of the facts, should be different. We therefore examine the evidence and the proceedings before the Civil Service Commission, but only for the purpose of ascertaining whether that body had before it substantial

evidence to support its determination that the date of plaintiff's birth was September 28, 1864.

The evidence on which the Commission had to act was meager. There was no birth certificate, no family Bible, no marriage license or certificate, no school record, no work record, no life insurance data. There was nothing except several written statements and one oral statement made by plaintiff himself, most of them relating to his employment by the Government. The first of these was made May 28, 1917, at which time plaintiff would have been 47 years old, according to his contention, and 52 years old, according to the Civil Service Commission's finding made in 1939. That statement was made in plaintiff's application to take a Civil Service examination. He stated that he was born on September 28, 1868, and that his "age on last birthday" was 48. All his later statements were inconsistent with this one. Plaintiff's explanation that he was confused by the number of times the figure 8 appeared is not satisfactory because two of the three appearances of the figure 8 were wrong, according to all of his later statements and contentions. In 1918 and 1919 plaintiff filled out personal history forms for government employment records, giving September 28, 1869, as the date of his birth. These statements were made before the Retirement Act was passed in 1920. An application made in 1927 for membership in the Washington Board of Trade, an oral statement made on admission to a hospital for an appendectomy in 1933, and a written statement designating a beneficiary, made to the Civil Service Commission in 1935 all gave the date of birth as 1869, or an age consistent with that date of birth.

The Civil Service Commission, in accordance with its customary procedure in ascertaining the date of a Government employee's birth, in the absence of other records such as are frequently available, sought information from the Bureau of the Census. The earliest census from which information was supplied was that of 1900. That census listed one Edwin M. *Bailey* as born in New York in September 1864, as having a wife whose name was Mary C., as residing at 834 I St. NE., Washington, D. C. Aside from

the question of the date of birth, this information fitted plaintiff exactly, except that the last name, Bailey, was spelled in the way that names sounding like plaintiff's are nearly always spelled, and except that plaintiff lived, not on "I" Street but on "11" Street NE. and now thinks that he lived at 831 and not 834. The Bureau of the Census informed the Civil Service Commission that other persons, listed by the census enumerator as living at 832 and 834 "I" Street NE. were shown by city directories of about the same time as living at those numbers on 11 Street, on which street plaintiff lived. In these circumstances it was natural for the Commission to take the 1900 census data as applying to plaintiff, and to regard the statement of the date of his birth as important evidence. The census of 1910 gave plaintiff's name and address correctly, and his age as 45, which was consistent with the September 1864, date of birth given in the 1900 census. The 1920 census showed plaintiff's age as 57, and no one urges the correctness of that.

The Civil Service Commission could reasonably have concluded that the census information which, so far as appeared, must have been given by plaintiff or his wife, in 1900, when plaintiff was still relatively young and would have had no unfortunate experience in seeking employment or otherwise which would have made him conscious of the problem of age, was more dependable than statements made eighteen years and more later when plaintiff was, at least, nearly fifty years old. The census of 1910 gave support to the census of 1900 in regard to plaintiff's age.

The Civil Service Commission and its agents have, no doubt, acquired by study and experience an expertness in the resolution of these problems which we do not have. The Commission's deductions from evidence such as it had before it when it passed on plaintiff's application for retirement, should not, in the circumstances here present, be disturbed.

Plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NATIONAL FIREPROOFING CORPORATION v. UNITED STATES

[No. 44004]

NATIONAL FIREPROOFING CORPORATION v. UNITED STATES

No. 44067

[Decided June 7, 1943]

On the Proofs

Increased costs under National Industrial Recovery Administration Act.—Where plaintiff (No. 44004) after the enactment of the National Industrial Recovery Administration Act increased the minimum wage of its employes from 20 to 25 cents per hour; and where later, no Code of Fair Competition for its industry having yet been adopted, plaintiff in accordance with the provisions of the President's Reemployment Agreement, which plaintiff had signed, paid its employes the minimum wage of 40 cents per hour specified in said Reemployment Agreement; and where, even after the adoption and approval of the Code of Fair Competition which provided a minimum wage of 37½ cents per hour, plaintiff continued to pay the minimum wage of 40 cents per hour; it is *held* that plaintiff, under the provisions of the Act of June 25, 1938, is entitled to recover the increase from 25 cents to 40 cents per hour even after the adoption of the Code of Fair Competition.

Same.—As a practical proposition, since plaintiff was paying 40 cents an hour at the time of adoption of the Code of Fair Competition, plaintiff could not reduce its wages to the minimum prescribed by the Code in view of the dissatisfaction which this necessarily would have caused among its employes.

Same.—The 5 cents per hour increase was the result of the enactment of the National Industrial Recovery Administration Act, there being no proof that there was any labor agitation in plaintiff's plant prior to the enactment of that Act.

Same.—Where plaintiff (No. 44067) after the enactment of the National Industrial Recovery Administration Act, and following a strike among its employes, increased the minimum wage of its employes from 22½ cents to 40 cents per hour, which was the minimum wage prescribed by the President's Reemployment Agreement, and continued to pay said minimum of 40 cents per hour even after the adoption of the Code of Fair Competition, under the provisions of which a minimum wage of 37½ cents was fixed; it is *held* that the plaintiff is entitled to recover under the provisions of the Act of June 25, 1938.

Reporter's Statement of the Case

Same.—The increase (No 44067) was the direct result of the enactment of the National Industrial Recovery Administration Act; there being no proof that there was any agitation among plaintiff's employes for wage increase prior thereto.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

For the purposes of the findings of fact, conclusion of law, and opinion, the above cases were consolidated, and the court, upon the evidence and the reports of a commissioner, made special findings of fact, as follows:

1. Plaintiff, a Pennsylvania corporation, is engaged in the manufacture of structural clay products and has its principal office in Pittsburgh, Pennsylvania.

August 31, 1932, defendant entered into a written contract with Starrett Brothers & Eken, Inc., of New York, New York, as prime contractor, for the construction of a Post Office at Philadelphia, Pennsylvania. October 5, 1932, the prime contractor entered into a written subcontract with John B. Kelly, Inc., of Philadelphia, whereby the subcontractor agreed to furnish all material and labor for the brick, hollow tile, and salt glazed tile work required by the contract between defendant and the prime contractor. May 4, 1933, the subcontractor, John B. Kelly, Inc., entered into a contract with plaintiff for the purchase from the latter at stated prices, for future delivery as required, of all the salt glazed tile necessary for the performance of the subcontract between John B. Kelly, Inc., and the prime contractor.

February 6, 1933, defendant entered into a written contract with John McShain of Philadelphia, Pennsylvania, as prime contractor, for the construction of a Naval Hospital and other buildings connected therewith at Philadelphia. February 24, 1933, the prime contractor entered into a written subcontract with John B. Kelly, Inc., of Philadelphia, whereby the subcontractor agreed to furnish all material and perform all labor incident to the brick, hollow tile, and salt glazed tile work required by the contract between defendant and the prime contractor. March 28, 1933,

the subcontractor, John B. Kelly, Inc., entered into a contract with plaintiff for the purchase from the latter at specified prices, for future delivery as required, of all of the hollow tile necessary for the performance of the subcontract between John B. Kelly, Inc., and the prime contractor.

2. The year 1933 was the low mark of the financial depression in the structural clay producets industry in which plaintiff was engaged. Chaotic conditions prevailed in plaintiff's business as well as in the industry in general. Wages were at a very low level, varying from a high of 22½ cents an hour in the North to a low of 10 cents an hour in some places in the South. Plaintiff owned 21 plants, but during the year 1933 only seven or eight of these were in operation.

Early in June 1933, while Congress was considering the passage of the law which was enacted as the National Industrial Recovery Act on June 16, 1933, plaintiff's president and other plant operators from the structural clay products industry met for the purpose of organizing as an industry and formulating plans for a code of fair competition applicable to their industry. In the discussion on wages a sharp dispute developed between the northern and southern manufacturers with respect to proposed wage rates in the South and the proper differentials between the northern and southern wage rates. A committee, of which plaintiff's president was a member, was appointed to draft a proposed code of fair competition for the structural clay products industry, and subsequent meetings were held in Washington in July and again during the early part of August 1933, when the proposed code was formulated and submitted to officials of the National Recovery Administration. The controversy between the northern and southern manufacturers continued during these latter meetings. The southern manufacturers were "up in arms" over the proposal that the base wage rate be fixed at 40 cents an hour in the North and 30 cents an hour in the South. They contended that they could not afford to pay a 15-cent rate. At the same time the unions were advocating wage rates of 60 cents an hour in the North and 50 cents an hour in the South.

3. While the discussions on the proposed code of fair competition were in progress, the provisions of the President's Reemployment Agreement (hereinafter referred to as the PRA), authorized by Section 4 (a) of the National Industrial Recovery Act, were announced on July 28, 1933. At that time the base rate of pay for workmen in plaintiff's East Canton, Ohio, plant, where the material for the performance of its Post Office contract with John B. Kelly, Inc., was manufactured, was 20 cents an hour and the workweek was 60 hours. Compliance with the PRA would have required a minimum base wage rate of 40 cents per hour and a 40-hour maximum workweek.

At that time the base rate of pay for workmen in plaintiff's Perth Amboy, New Jersey, plant, where the material for the performance of its Naval Hospital contract with John B. Kelly, Inc., was manufactured, was 22½ cents an hour and the workweek was 60 hours. Compliance with the PRA would have required a minimum base wage rate of 40 cents per hour and a 40-hour maximum workweek.

Much publicity was given to the wage and hour provisions of the PRA and many employers throughout the country promptly signed the Agreement and made increases in wages and reduction in hours of work in compliance therewith, although none of plaintiff's competitors in the territory of its East Canton, Ohio, and Perth Amboy, New Jersey, plants had adopted the Agreement. As a result of this publicity and other activities in connection with the National Industrial Recovery Act, plaintiff's employees at the East Canton plant began agitating for plaintiff to sign the Agreement. When there was delay in the matter, unrest developed among them because the prevailing wage rates were so low.

As a result of the publicity given to the wage and hour provisions of the PRA and wage increases made in the vicinity of its Perth Amboy plant by other employers, plaintiff's employees at its Perth Amboy plant insisted that plaintiff sign the Agreement. When there was delay in the matter, unrest developed among them because the prevailing wage rates were so low.

4. Plaintiff did not blame its employees for urging its adoption of the Agreement because it realized that the wages paid were too low. However, plaintiff did not feel that it could sign the Agreement at that time. Plaintiff's business was in a bankrupt condition and its officials did not see how they could make the required increases in wages unless at the same time they could make up the resulting cost by increased earnings or otherwise. Comparatively few of the operations in plaintiff's plants employed workmen who were earning the base rate of pay. The majority were employed on a piecework basis at rates graduated from the base rate. In order to comply with the Agreement, it would have been necessary for plaintiff to make an equitable adjustment in the rate of pay for these piecework employees so that they would earn as much under the shortened workweek as they were earning under the existing workweek.

Plaintiff had plants in New Jersey, Ohio, Michigan, Indiana, and Alabama. Conditions in the industry were highly competitive and wage rates varied from community to community, and considerable time and study were required to determine the equitable adjustment in wage rates applicable to employees in all of plaintiff's plants in operation. The cycle of operations in plaintiff's plants was laid out on the basis of a 60-hour workweek, and time was also required to enable plaintiff to adapt its production schedule to the 40-hour workweek. In addition plaintiff preferred to be governed by the Code of Fair Competition for the industry rather than the PRA, because it believed that the Code would apply more equitably to the industry, would affect all members of the industry alike, and would settle the question of the northern and southern wage differentials.

As late as August 1, 1933, plaintiff had reasonable assurance that a code of fair competition would be approved before September 1, 1933, in which event the necessity for its signing the PRA would be obviated. Accordingly, in an effort to hold the men off until the Code could be approved and to convince them that plaintiff was actively trying to work out a satisfactory code, it wrote its superintendents in the various plants on July 31, 1933, as follows:

You are no doubt being asked by your employees what the company is doing in relation to government codes.

Representatives of the heavy clay products industry which includes the Structural Clay Tile Industry held a meeting in Washington last week on July 26th, 27th, and 28th, with representatives of the N. I. R. A. for the purpose of drafting a code that would be acceptable to the government. This was an informal meeting but the Committee representing the heavy clay industries was told what would and would not be acceptable in this code. They were requested not to formally present this code until they were advised because the government desired to bring the sewer pipe, roofing tile, drain tile, and clay pot industries in under the National code. It will be at least three weeks before a formal hearing can be held on this code.

The various associations representing the heavy clay products industries are not signing the blanket code because of the desire to begin work under the National Code.

You are authorized to tell your employees that regardless of whether we are working under an approved code by September first or not, action will be taken on our part to increase wages and reduce working hours. It is hoped that between the fifteenth of August and the first of September that this matter will have been satisfactorily settled and we will be working according to government ruling.

5. Plaintiff's position stated in this letter, which was read to all employees, was not satisfactory to them. They demanded that plaintiff immediately sign the PRA without waiting for the approval of the Code, but at the East Canton plant, in case 44004, there was no stoppage of work. However, plaintiff met with its employees at this plant and made an agreement with them on August 22, 1933, by the terms of which plaintiff granted the employees in its East Canton, Ohio plant a wage increase of five cents an hour, thereby raising the base rate to 25 cents an hour. At the same time plaintiff promised the workmen that it would on September 1, 1933, sign the PRA and make an additional increase in wages and a reduction in the hours of work

to meet its requirements unless the Code was in effect by that date, in which event plaintiff agreed to comply with the provisions of the Code. No reduction in hours was made at that time. The employees wanted a greater increase in wages than was granted but they were not interested in a reduction in hours. The wage increase of August 22, 1933, was made in anticipation of plaintiff's signing the PRA by September 1, 1933, unless it became bound by the Code before that date. The Code not having been approved by September 1, 1933, plaintiff signed the PRA on September 2, 1933, and made the required increases in pay and reduction in weekly hours of work to comply with the provisions of said Agreement. Plaintiff found that the requirements of the Agreement would be met by increasing the hourly rate of pay of each of its employees 15 cents an hour in addition to the five-cent increase which was made on August 22, 1933. Therefore, on September 2, 1933, plaintiff increased the hourly rate of pay of all of its employees in its East Canton plant in the sum of 15 cents an hour, thereby raising the base rate to a minimum of 40 cents an hour and at the same time providing the equitable adjustment required by the PRA for those employees who were earning more than 40 cents an hour.

Plaintiff's employees at the Perth Amboy plant, in case 44067, were likewise dissatisfied with plaintiff's refusal to sign the PRA, and even greater agitation resulted here than in the case of East Canton plant. This culminated on August 2, 1933 in a strike. When the employees went on strike the Secretary of the union sent the following telegram to the National Recovery Administration:

> Employees of National Fireproofing Co. left service on account of company rejecting blanket code July 31. Please advise what action employees should take. Men refuse to return to work until it is adopted. H. Sieber, 448 Compton Ave., Acting Secy., Perth Amboy, N. J.

This telegram was referred to the National Labor Board which was then being organized, and the Board wrote plaintiff on August 17, 1933, quoting the telegram, and requesting it to submit a statement as to the present status of the matter and the company's position regarding it. Through meetings with employees it arrived at an agreement

by the terms of which plaintiff increased the wages of the workmen from 22½ cents per hour to 40 cents per hour and the men returned to work. The wages of workmen paid in excess of 22½ cents an hour prior to August 4, 1933, were also adjusted proportionately on that date. At the same time plaintiff agreed that it would sign the PRA on September 1, 1933, if a code of fair competition was not in effect by that date. No reduction in the hours of work was made on August 4, 1933. The workmen did not want a reduction in hours. They were insisting on higher wages.

6. When plaintiff signed the PRA on September 2, 1933, it did not increase wages further, but reduced the workweek from 60 hours to 40 hours, in accordance with the agreement.

December 7, 1933, plaintiff became bound by the Code of Fair Competition for the Structural Clay Products Industry. The Code provided that the hourly rate of pay for factory workers and artisans should be not less than 37½ cents per hour and that the unit rates paid other employees, whether employed on a time-rate or piecework basis, should be adjusted to continue the existing wage differentials. After the adoption of the Code plaintiff continued the 40-cent base wage rate which was in effect on September 2, 1933, for all its employees in both plants, except those who were hired after December 7, 1933. The latter employees were paid in accordance with the 37½-cent rate specified in the Code.

7. In case No. 44004 plaintiff's costs of the performance of its contract were increased by the amount of $2,592.05 as a result of the increase granted on August 22, 1933, and they were increased by the amount of $7,776.14 as a result of the increase to 40 cents an hour on September 2, 1933.

In case No. 44067 plaintiff's costs were increased by the amount of $2,929.25 as a result of the increase in wages at the Perth Amboy plant from 22½ cents to 40 cents an hour on August 4, 1933. No portion of these increases has been paid by the defendant.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Cases Nos. 44004 and 44067 are both suits for the recovery of increased costs alleged to have been incurred as the result

of the enactment of the National Industrial Recovery Act. They are brought under the Act of June 25, 1938 (52 Stat. 1197), entitled "An Act to confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933."

In No. 44004 the plaintiff contracted with John B. Kelly, Inc., to furnish it the necessary brick, hollow tile, and salt-glazed tile for the construction of a Post Office at Philadelphia, Pennsylvania, and in No. 44067 plaintiff contracted with the said John B. Kelly, Inc., to furnish it the necessary brick, hollow tile, and salt-glazed tile for the construction of a Naval hospital and other buildings connected therewith at Philadelphia, Pennsylvania. The materials furnished for the Post Office building at Philadelphia were furnished by plaintiff's East Canton, Ohio plant, and the materials used in the construction of the Naval hospital were furnished by plaintiff's Perth Amboy, New Jersey, and its Lorrilard plant.

Prior to the enactment of the National Industrial Recovery Act of June 16, 1933 there was a condition of severe financial depression in the structural clay products industry. Plaintiff was in an acute financial condition verging on bankruptcy, finally culminating in a reorganization under 77B of the Bankruptcy Act. Wages were at a very low level, varying from a high of 22½ cents an hour in the North, to a low of 10 cents an hour in some parts of the South. Laborers, quite naturally, were dissatisfied with the wages received, but the proof indicates that business conditions were so bad that nothing could be done about it.

One of the declared purposes of the National Industrial Recovery Act was "to improve standards of labor," and to effectuate this purpose, among others, the President was authorized to issue licenses when he should find that any trade or industry was engaging in destructive wage practices, price cutting, or other activities contrary to the policy of the Act. Under section 7 employers were required to assure the right of collective bargaining to their employees, and were prohibited from requiring an employee to join a

company union and from preventing him from joining a labor organization of his own choosing, and employers were required to comply with the "maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President." There were other provisions intended to assure better pay, lesser hours, and improved conditions of employment.

After the passage of this Act plaintiff's employees gave voice to their dissatisfaction with their rates of pay. Then on July 28, 1933 the President called upon industrialists to sign the President's Reemployment Agreement, which prescribed 40 cents an hour as the minimum wage and 40 hours a week as the maximum workweek, and agitation among plaintiff's employees for increased wages increased.

On account of the difference in the wages prevailing in plaintiff's northern and southern plants plaintiff did not desire to sign the President's Reemployment Agreement, but was diligent in its efforts to agree with other members of its industry on a code of fair competition. In an effort to induce its employees to defer their demand for increased wages until after the adoption of a Code for the industry plaintiff addressed a communication to the superintendents of its various plants, the first paragraph of which reads:

> You are no doubt being asked by your employees what the company is doing in relation to government codes.

The letter then sets out the efforts that were being made to agree upon a Code, and stated that plaintiff was not signing the President's Reemployment Agreement because it hoped to agree on a Code which would more nearly meet conditions in this industry than the PRA. The letter concluded:

> You are authorized to tell your employees that regardless of whether we are working under an approved code by September first or not, action will be taken on our part to increase wages and reduce working hours. It is hoped that between the fifteenth of August and the first of September that this matter will have been satisfactorily settled and we will be working according to government ruling.

Opinion of the Court

The employees in both the Perth Amboy plant (case No. 44067) and in the East Canton plant (case No. 44004) were dissatisfied with this arrangement and demanded that plaintiff at once sign the President's Reemployment Agreement. This plaintiff would not do, but at its East Canton plant, in an effort to satisfy its employees, it agreed, on August 22, 1933, to increase their wages to 25 cents an hour, an increase of 5 cents an hour, and it also agreed that not later than September 1, 1933 it would sign the PRA and pay the wages therein specified, unless in the meantime a Code had been adopted and approved. From this date, August 22, 1933, the plaintiff paid these increased wages. On September 1, 1933 no Code had been adopted or approved, and accordingly plaintiff, in conformity with its promise, signed the PRA on September 2, 1933, and thereafter paid its employees the minimum wage specified therein, and at the same time equitably adjusted the wages of its employees who had been receiving more than the minimum wage specified by the PRA. This resulted in an increase of 15 cents an hour over the amount agreed upon on August 22, 1933. On December 7, 1933 a Code for the industry was adopted and approved. This provided for a minimum wage of 37½ cents an hour at both the East Canton and Perth Amboy plants. Plaintiff, however, continued to pay the minimum wage of 40 cents an hour after the adoption of the Code.

In case No. 44004 (the East Canton plant) the defendant admits that plaintiff is entitled to recover its increased costs incident to the increase in wages from 25 cents an hour, the August 22, 1933 minimum, to 40 cents an hour until December 7, 1933, and thereafter the increase from 25 cents an hour to 37½ cents an hour, the minimum prescribed by the Code. This total amount is $6,739.58.

A majority of the court is of the opinion that the plaintiff is entitled to recover the increase from 25 cents an hour to 40 cents an hour even after the adoption of the Code, although the Code prescribed a minimum rate of 37½ cents an hour. Plaintiff was paying 40 cents an hour at the time of its adoption, and as a practical proposition it could not reduce its wages to the minimum prescribed by the

Code, in view of the dissatisfaction which this necessarily would have caused among its employees. It was required by the President's Reemployment Agreement, adopted under the National Industrial Recovery Act, to pay the minimum of 40 cents an hour, and the National Industrial Recovery Act having established this as the minimum wage, a majority of the court is of the opinion that its continuation to pay this minimum wage was the direct result of the enactment of the National Industrial Recovery Act, although under that Act it was later agreed that the minimum wage should be 37½ cents an hour. The difference between 37½ cents an hour and 40 cents an hour after December 7, 1933, amounts to $1,036.56.

Defendant also says that plaintiff is not entitled to recover the 5-cent increase granted on August 22, 1933. It says that this increase was not the result of the enactment of the National Industrial Recovery Act, but was the result of long-standing labor agitation. But there is no proof in the record that there was any labor agitation prior to the passage of the National Industrial Recovery Act. The inference is to the contrary.

It is true that plaintiff did not sign the PRA until after the increase was granted, but it was granted as the direct result of the agitation resulting from the passage of the National Industrial Recovery Act and from plaintiff's failure to sign the President's Reemployment Agreement promulgated thereunder. The increase was granted as the immediate result of the demand of its employees that it sign the President's Reemployment Agreement. It was granted in an effort to induce them to postpone this demand. It is plain, therefore, that the increase was directly attributable to the passage of the National Industrial Recovery Act.

This increase in wages increased plaintiff's costs at the East Canton plant (case No. 44004) by the amount of $2,592.05. This added to the increased cost of $7,776.14, as a result of the increase from 25 cents an hour to 40 cents an hour, makes a total increased cost of $10,368.19. We are of opinion that the plaintiff is entitled to recover this amount. Judgment therefor will be entered in case No. 44004. It is so ordered.

The facts in case No. 44067 (the Perth Amboy plant) differ but little. There was the same agitation for increased wages after the passage of the National Industrial Recovery Act; there was the same dissatisfaction with plaintiff's refusal to sign the President's Reemployment Agreement; but, in this case the employees in the Perth Amboy plant expressed their dissatisfaction in more positive fashion; they struck. The strike was called on August 2, 1933, almost immediately after receipt of plaintiff's letter of July 31, 1933. On that date H. Sieber, Acting Secretary of the union at Perth Amboy, wired the National Recovery Administration, stating:

> Employees of National Fireproofing Co. left service on account of company rejecting blanket code July 31. Please advise what action employees should take. Men refuse to return to work until it is adopted.

This telegram was referred to the National Labor Board, and on August 17, 1933 the Secretary of this Board wrote plaintiff quoting the telegram and asking to be advised of the present status of the matter and what the company was going to do about it. Prior to receipt of this letter, however, plaintiff had met with its striking workmen and had agreed to increase their wages from 22½ cents an hour to 40 cents an hour, the minimum prescribed by the President's Reemployment Agreement, and it also agreed, as it had done at the East Canton plant, that it would sign the PRA on September 1, 1933, if in the meantime a Code of Fair Competition had not been adopted.

As in the case of the East Canton plant, plaintiff continued to pay this minimum of 40 cents an hour, even after the adoption of the Code of December 7, 1933, and a majority of the court is of the opinion that it is entitled to the increase from 22½ cents an hour to the 40 cents minimum, even after the adoption of the Code.

Defendant says in its brief in this case also that this increase of 17½ cents an hour was the result of "long-standing agitation by plaintiff's employees for higher wages," and that the National Industrial Recovery Act did nothing more than aggravate an "already serious situation." The record, however, does not sustain this statement. There

is no proof of any agitation prior to the adoption of the National Industrial Recovery Act on June 16, 1933. No doubt there was dissatisfaction, but, so far as the record discloses, expression was never given to it until after the passage of this Act. After the Act was passed there was agitation and it increased after the promulgation of the President's Reemployment Agreement, and it culminated in a strike when plaintiff on July 31, 1933, notified its employees that it would not sign the agreement until after September 1, 1933. The increase granted, therefore, was the direct result of the passage of this Act.

Each of these cases must be decided on its own facts, but see *McCloskey* v. *United States*, No. 44003, 98 C. Cls. 90. We do not think that *Dravo* v. *United States*, 93 C. Cls. 745, is in conflict herewith.

The increased cost incident to an increase of wages to 40 cents an hour from August 4, 1933, amounts to $2,929.25. This amount plaintiff is entitled to recover in case No. 44067. Judgment therefor will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NATIONAL ELECTRIC SIGNALING COMPANY; PAUL H. BYERS, RECEIVER OF NATIONAL ELECTRIC SIGNALING COMPANY AND INTERNATIONAL RADIO TELEGRAPH COMPANY, NOW INTERNATIONAL DEVICES COMPANY, v. THE UNITED STATES

[No. C-26. Decided May 3, 1943. Plaintiffs' motion and defendant's motion for new trial overruled October 4, 1943]

On the Proofs

Patents; compensation for infringement.—Fessenden patents 1,050,441 and 1,050,728, directed to a method and apparatus for the transmission of signals by radio, known as a heterodyne system, held valid and infringed by the Government, under the decision of January 9, 1933, 76 C. Cls. 545.

Same; reasonable royalty a question of fact.—Where Government manufactured or had manufactured for it, wireless receiving units, or sets, utilizing heterodyne inventions without consent of owner of patents, question of what was a reasonable royalty in the circumstances was a question of fact.

Same; measure of compensation.—Upon all the evidence adduced on accounting and in view of the basic or pioneer character of the heterodyne inventions covered by the patents in question, and their value and importance in the related art, it is *held* that a reasonable royalty is 18 percent of the cost of the receivers used for heterodyne reception and the same percentage of the cost shown by the evidence to be properly allocable to heterodyne use of receivers embodying the heterodyne inventions, to the extent that they were used for such heterodyne reception, plus interest at 5 percent per annum for the accounting period, not as interest but as a part of just compensation.

Same; limitation of recovery.—Transmitters, such as were used by the defendant during the accounting period, were old in the art at the time of issuance of the patents in suit, and the novel and patentable features covered by the patents in suit are limited by the doctrine announced by the Supreme Court in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, to apparatus for and method of receiving wireless communications.

The Reporter's statement of the case:

Mr. Jo. Baily Brown for the plaintiffs.

Mr. Clifton V. Edwards, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. F. Mothershead* and *Mr. T. Hayward Brown* were on the brief.

This case is now before the court on accounting for the purpose of determining reasonable and entire compensation for the use by the government, without the consent of the owner, of inventions covered by certain patents for the accounting period from February 5, 1917, to June 21, 1920. The amount of compensation asked is $689,584.64, together with an additional amount measured by a reasonable rate of interest at 5 percentum per annum.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The court in its special findings of fact and opinion of January 9, 1933, (76 C. Cls. 545), held that Fessenden patent 727,330 was invalid as to claims 1 and 5 which were

relied upon; that Fessenden patent 979,144 was invalid as to claim 1 which was relied upon; that Fessenden patent 1,050,441 was valid and infringed as to claims 1–4, inclusive, 6, 9, 22–25, inclusive, and 29; and that Fessenden patent 1,050,728 was valid and infringed as to claims 1, 2, 9–12, inclusive, and 14.

The reasonable and entire compensation is based upon the infringement of the two last enumerated patents, which are known as the "heterodyne" patents.

2. The accounting period in this case is from February 5, 1917 (six years prior to the filing of the original petition in this case) to June 21, 1920, at which time the plaintiffs sold the patents in suit.

The two Fessenden patents which form the basis of this accounting relate respectively to apparatus for (patent 1,050,441) and a method of (patent 1,050,728) radio communication.

3. In so far as the present accounting is concerned, it is limited to radio telegraphy in which letters and symbols are represented by certain groupings of dots and dashes produced at the transmitting station by a telegraph key which is closed for a relatively short interval to form a dot and for a longer interval to form a dash. These signals are conveyed from the receiving apparatus to the ear of the operator at the receiving station by means of a telephone receiver, or an equivalent device, as sounds of short or long duration, and as the message is received the receiving operator re-transcribes these sounds into the original letters and symbols.

The pitch or frequency of the sound produced in the telephone receivers at the receiving station must be within the perception range of the human ear, or, to use radio terminology, must be of "audio-frequency." By way of example, a tone having a frequency of 500 cycles per second produces a well-defined musical note.

4. In the transmission of energy from the transmitting antenna to the receiving antenna it is necessary to utilize alternating currents of extremely high frequency, these sometimes being in the nature of one million cycles per second. These high frequency or "radio-frequency" cur-

rents are produced by a suitable generating means at the transmitting station and caused to flow in the antenna circuit. Energy is radiated from that antenna at a wavelength determined by this "radio-frequency," some of this energy being picked up by the receiving antenna which is tuned to respond to that particular radio-frequency.

The energy flowing in the transmitting antenna may be broken up into periods of short or long duration by means of a telegraph key, but as this radio-frequency is far above the range of audibility it is necessary to modulate the radio-frequency energy at an audio-frequency either at the transmitting station or at the receiving station in order to transmit intelligence.

One of the features of the heterodyne patents in suit relates to the production of an audio-frequency at the receiving station.

5. With reference to the production of an audio-frequency tone at the transmitting station, two systems were in use at the beginning of the accounting period. These systems were as follows:

(a) The spark transmitter. In this system the high-frequency energy fed into the antenna was created by the discharge of a condenser across a spark gap. Each discharge of the spark gap or each spark created a train of radio-frequency waves. The high voltage necessary to charge the condenser and cause the spark gap to operate was supplied by means of a transformer which changed an input current of relatively low voltage into an output current of high voltage. The input low voltage current was varied at audio-frequency, thereby causing a series of sparks at audio-frequency.

As a specific and widely used example, the input of the transformer was connected to a generator supplying an alternating current at a frequency of 500 cycles per second. Each time the current reached its peak in the cycle a spark occurred across the spark gap, releasing an individual train of high-frequency energy which was fed into the transmitting antenna. The telegraph key was connected to control the flow of 500 cycle current to the transformer so that as long as the key was held closed a series of trains of radio-frequency waves emanated from the transmitting antenna, the individual

trains of which were spaced apart at an audio-frequency of 500 cycles. Suitable manipulation of the key therefore formed the dots and dashes of the Morse code at an audio-frequency of 500 cycles.

Spark transmitting systems were in use throughout the accounting period.

(b) The chopper. In this system a generator of continuous high-frequency energy, such as an arc or alternator, was employed. The technical definitive name of this type of transmission is "continuous wave" or, as frequently abbreviated, CW. The supply of this energy through the antenna circuit was controlled by means of a telegraph key arranged to supply the antenna circuit with long or short impulses of high-frequency energy.

As this was of itself above the range of audibility a device known as a chopper was associated with the circuit, the chopper comprising, as essential elements, some device such as a rotating motor-driven wheel having a series of contact segments on its periphery which interrupted, or chopped up, the continuous high-frequency energy into a series of impulses at audio-frequency. The continuous wave when thus interrupted at audio-frequency (technically called interrupted continuous wave or ICW) permits the emanation of radio signals at an audio-frequency from the transmitting antenna.

The chopper was in use at the beginning of the accounting period but was superseded by the heterodyne system.

6. Three systems were available for use at the beginning of the accounting period in which the audio-frequency modulation was performed in the receiving system instead of the transmitting system. They were as follows:

(a) The rotating condenser. In this system the transmitted high-frequency wave and the energy flowing in the receiving antenna were CW (continuous wave) in character. A specially designed condenser consisting of a fixed plate and an adjacent motor-driven rotating plate connected into the receiving circuit functioned to alternately tune and detune the receiving circuit once for every revolution of the rotating plates. Thus the high-frequency energy radiated by the sending station and absorbed by the receiving antenna was broken up into a series of impulses of audio-

frequency current, which, when rectified by a suitable detector, caused an audible note or tone in the receiving telephone head set, which was dependent upon the speed of rotation of the rotating plates. Therefore, whenever the sending key at the transmitting station was depressed a tone or note was audible at the receiving station and the sending key could therefore be utilized to produce the Morse code.

(b) The tikker. The tikker method is somewhat similar to that which has been described as the chopper method in connection with the transmitting circuit, the tikker, however, being located and functioning in connection with the receiving circuits.

One conventional form of tikker was a rotating brass wheel having a fine steel wire making a light contact in a groove on the periphery of the wheel. The slight irregularities in the surface of the wheel caused the circuit to open and close at more or less irregular intervals. When the circuit was open a condenser in the receiving circuit became charged and when the circuit was closed the condenser discharged. These irregular discharges passed through the telephone head set, each one causing a click. The speed of the rotating disc was such that the clicks followed each other so closely that they resulted in a sound in the telephone head set best described as being "hissing" or "mushy" in character. The sound produced was of this character rather than that of a musical tone because of minute irregularities on the periphery of the wheel, which in turn caused the condenser to charge and discharge in an irregular manner.

(c) The tone wheel. In the method of tone wheel reception the basic element also comprised a motor-driven rotating member. In this case the member was a rotating wheel having a relatively large number of conducting teeth or contact segments on its periphery. Each contact segment was separated from the preceding segment on the periphery by an insulating segment of exactly the same peripheral width. A stationary contact brush was mounted to press against the periphery of the wheel so that, as the same rotated, the electrical circuit thus formed was alternately

opened and closed, the duration of the open period being exactly the same as the closed period.

The tone wheel was driven by an electric motor, the speed of which could be readily adjusted by means of a control knob. The rotational speed of the disc and the number of contact segments on its periphery were so selected that the interruptions produced had substantially the same frequency as the received high-frequency energy. The received continuous wave current was passed through the brush and tone wheel contacts to the head telephones. If by means of the speed-adjusting knob a speed was selected at which the frequency of interruptions by the tone wheel were exactly in step with the cycle of the high-frequency current, no sound would be heard in the telephones, the resultant interruptions of the current by the tone wheel occurring at a fixed relationship with the cycle of the incoming high-frequency and being above audio-frequency.

If, however, the speed of the tone wheel was adjusted so that it was either slightly faster or slower than the synchronous speed, the interruptions of the tone wheel either gradually overtook or lagged behind the individual cycles of the high-frequency current, thereby causing a relatively slow periodical change (at audio-frequency) in the current flowing to the telephones whenever the transmitting key was depressed.[1] The operation of the tone wheel thus intro-

[1] A crude mental picture of the operation of the tone wheel may be had by visualizing as the received high-frequency energy a freight train traveling at 60 miles an hour and made up of alternate box cars and flat cars of the same length. If the tone wheel be now visualized as a second similar freight train with alternate box cars and flat cars traveling on a parallel track, it will be evident that if both trains travel in the same direction of exactly 60 miles an hour there will be no relative movement and no relative effect between the two trains traveling side by side.

If, however, the speed of the second train (the tone wheel) is either increased or decreased to 61 miles per hour or 59 miles per hour, there will be a relatively slow movement of one train with respect to the other at a speed of but one mile per hour, and at this relatively low speed the box cars in the second train will either gradually overtake or lag behind the box cars of the first train, so that the box cars of the second train will slowly pass the flat cars of the first train and again come into step with the box cars of the first train.

If it be assumed that sunlight was shining across the two tracks the amount of light shining through the two trains will be a minimum when a box car is opposite a flat car and will slowly become a maximum when the box cars are in step with each other.

duced an audio-frequency component into the received current, the pitch of which was dependent upon the extent to which the tone wheel is out of synchronism.

The tone wheel possessed the following advantages:

(1) The range of audible tone frequency was relatively narrow, so that it was possible to select the particular station whose signal it was desired to receive to the exclusion of other stations transmitting at the same time.

(2) The sound received by the telephones was in the nature of a musical tone, the pitch of which could be varied by the receiving operator by adjustment of the control knob of the driving motor. The operator was therefore able to select any desired musical note or pitch that gave to his ear a maximum audibility and which he could distinguish from other signals of different pitch or from the irregular noises produced by static.

7. The tone wheel possessed one disadvantage in common with the tikker. In each of these devices the received energy, which was minute in character, had to flow through a brush bearing on the periphery of a rotating member. The contact between the brush and the rotating member was delicate in character and could easily get out of adjustment.

A second disadvantage arising from the use of the tone wheel was that the receiving circuit was interrupted or opened one-half of the time, and therefore one-half of the received energy was lost, although this did not of necessity mean a corresponding loss in signal strength heard in the telephones.

A third disadvantage in the use of the tone wheel existed in the fact that the pitch of the audio-frequency tone was dependent upon the maintenance of an absolutely steady speed of the driving motor, and any variation in this speed would cause a change in the pitch of the tone or, if the variation were great enough, an entire loss of the signal.

8. Both of the Fessenden patents, upon which the present accounting is predicated, eventuated from the same original patent application and both patents disclose the same apparatus and construction. Patent 1,050,441 carries the

claims directed to structure and patent 1,050,728 has claims directed to a method.

Both of these patents relate to the reception of signals by means of continuous high-frequency energy impressed upon the antenna at a receiving station. As stated in patent 1,050,728—

> The primary object of my invention is to eliminate interference and increase the intensity of signals, by operating the indicator at the receiving station by the conjoint energy of the received electric impulses, and certain cooperating currents produced locally at the receiving station. This application furthermore contemplates the production of signals by means of harmonic beats produced between the currents of the received electric pulses and the locally produced cooperating electric pulses, the indicator being moved by the energy of the combined currents and therefore being under control, as to the frequency of motion, by the receiving operator.

One of the objects indicated by the patent specifications is the production of an audio-frequency modulation at the receiving station.

The essential feature of both patents is that there is located at the receiving station a local source of continuous high-frequency oscillations, the frequency of which is controllable by the receiving operator. When high-frequency energy is received by the receiving antenna and the receiving circuits of the receiver, the high-frequency oscillations from the local source are also impressed upon the receiving circuit, and these local oscillations are so adjusted by the receiving operator as to differ slightly from the received oscillations from the transmitting station.

These two sets of oscillations interact to produce a beat note or tone, the resultant frequency of which is the difference in frequency between the oscillations received from the distant transmitting station and the oscillations produced by the local oscillating system at the receiving station, a proper selection of the local oscillations thereby resulting in producing a tone or signal of audio-frequency.

9. In the particular embodiment selected for illustration

in the patents in suit the local high-frequency oscillations are generated by a high-frequency alternator driven by an electric motor, the speed of which is controlled by means of a speed-adjusting knob or rheostat. If by this means a speed was selected at which the frequency of the local oscillations were exactly in step with the oscillations of the high-frequency current in the receiving antenna, no sound would be heard in the telephone. If, however, the speed of the local high-frequency generator was adjusted so that it was either slightly faster or slower, and the local oscillations were no longer synchronous with the received oscillations, the peaks of the local oscillations either gradually overtook or lagged behind the individual peaks of the received high-frequency current, thereby causing a relatively slow interacting periodical change (at audio-frequency) in the impulses acting upon the telephone diaphragm. A musical tone was thus produced in the telephone, the pitch of which was under the control of the receiving operator.

10. The patents are not limited to the particular embodiment referred to in the previous finding.

On pages 1 and 2 of patent 1,050,728 it is stated—

> As a frequency controlling device, it is preferred to use a high-frequency alternator, or any other suitable device for producing unintermittent oscillations, * * *.
> While a variety of forms of receiving devices may be employed, the construction shown in Fig. 3 is convenient and desirable.

In patent 1,050,441 it is suggested that a mercury lamp producing oscillations, or any other suitable source for producing unintermittent oscillations, may be used.

11. Claims 1, 2, 3, 4, 6, 9, 22, 23, 24, 25, and 29 of the structure patent 1,050,441 are valid and have been infringed by defendant during the accounting period. Claims 25 and 29 may be taken as typical and are as follows:

> 25. In wireless telegraph apparatus for transmitting energy, the combination of a transmitting station having apparatus for sending practically continuous high-frequency oscillations, a receiving station, a receiver at the receiving station and a source of practically continuous high-frequency oscillations operatively connected to the said receiver, substantially as described.

29. Electric signaling apparatus comprising a receiving station having an absorbing circuit, an indicator, a local generator of alternating current of frequency different from that of the received current, and means to operate said indicator by beats produced thereby in conjunction with the received current.

12. Claims 1, 2, 9, 10, 11, 12, and 14 of the method patent 1,050,728 are valid and have been infringed by defendant during the accounting period. Claims 1 and 11 may be taken as typical and are as follows:

I. In the art of electric signaling, the method which consists in moving an indicator at the receiving station by the interaction of the received impulses, forming the signal, and a series of sustained electric impulses locally produced at the receiving station and maintained with a frequency near to but not the same as the frequency of the received impulses.

II. The method of transmitting and receiving sustained alternating signal impulses, which consists in transmitting a continuous wave train of sustained oscillations, changing the frequency of such continuous wave train to produce signals, combining with such transmitted wave train at the receiver locally generated sustained oscillations and observing the combined effects of such oscillations.

13. Some of the advantages possessed by the heterodyne system of reception as predicated upon the patents in suit are summarized as follows:

(a) A narrow range of audible tone frequency contributed to the ability to select a particular station whose signal it was desired to receive to the exclusion of other stations transmitting at the same time.

(b) The exclusion of static noises and extraneous stations transmitting near the same wave length due to the ability of the operator to select any desired musical pitch that gave to his ear a maximum audibility.

(c) The combination of the locally generated energy at the receiving station with the received signal energy produced a selective amplification of the signal, or an increase of audibility, which resulted in an increased range of reception of signals over the prior art systems with the utilization of the same amount of energy at the transmitting station.

The advantages set forth in (a) and (b) resemble the advantages present in reception by the tone wheel (see Finding 6), with the distinction that the Fessenden heterodyne system obviated the use of any delicate rotating contacts or loss of energy by a periodic interruption of the current and was more rugged and simple in character.

The term "selective amplification" as used in advantage (c) refers to an amplification effect dealing only with the desired selected or heterodyned signal in contradistinction to amplification or amplifiers used in radio reception in which the desired signal and the extraneous background noises are both amplified.

14. The practical effect resulting from the use of the Fessenden heterodyne system was the creation of a more selective, sensitive, and rugged receiver by means of which signals could be received from a transmitting station of given power over an increased distance as compared with the prior art receivers. Messages could be received under conditions of static and interference where the prior art receivers would not operate to receive intelligible signals.

The heterodyne patents in suit were basic or pioneer in character and the inventions covered therein have been of great value in the radio art.

15. During the accounting period the United States purchased, acquired, or manufactured and used wireless receiving sets and systems having circuits and devices for receiving continuous wave wireless telegraph signals by the heterodyne method of reception as covered by the patents in suit.

Substantially all reception by defendant of continuous wave wireless telegraph signals during the accounting period was by the heterodyne method.

These sets are listed in the accompanying itemized schedules.

16. Signals transmitted by a spark transmitter or interrupted continuous wave (see Finding 5) were adapted to be received either on a crystal or other nonoscillating detector, and this was normal practice when the transmitting station was sufficiently near or where there was no serious interference. If, however, the spark or interrupted continuous wave signals were of very low audibility or not audible by this

normal method of reception, the selective amplification characteristic of the Fessenden heterodyne method was of advantage in increasing the signals in intensity and audibility.

The use of the heterodyne method in the reception of spark signals destroyed the natural musical tone of the spark signal and resulted in a mushy or hissing tone, which was of itself a disadvantage, but at the same time the signal intensity was increased and signals rendered audible which otherwise would not have been heard, so that the resultant effect was an advantage.

17. The defendant utilized heterodyne reception to a limited extent in connection with spark signals. The extent of such use was dependent upon the type of receiving set and is indicated in the itemized schedules which follow.

18. It was not possible in this accounting for plaintiffs to prove the specific profits made by the various manufacturers of the receiving apparatus listed in the subsequent findings, the records in many instances having been lost or destroyed before the accounting stage in this case.

19. Both prior to and during the accounting period plaintiffs refused to license others to manufacture or use apparatus under the patents in suit and refused to sell heterodyne apparatus that might go into commercial communication service, and there was no established royalty.

Plaintiffs during the period of World War I offered to manufacture for and sell the defendant wireless telegraph receivers embodying and utilizing the inventions in suit. The record does not show any purchase by defendant from plaintiffs of such receiving apparatus during the accounting period.

20. Various types of continuous wave transmitters were old and in use prior to the patents in suit.

The patents in suit disclose nothing novel and expressed no monopoly with respect to the production of or emanation of continuous waves from a transmitting station. They do not relate to either the construction or method of operation of a continuous wave transmitting station.

The patents in suit relate to and cover the heterodyne beat note method of reception and apparatus therefor, whereby a radio receiver is rendered more sensitive and can

receive a signal transmitted by continuous waves over greater distances with greater selectivity and reliability as compared to prior art receivers.

Just and reasonable compensation for the use of plaintiffs' invention is based upon the receiving sets manufactured, acquired, or used by the defendant during the accounting period.

21. The majority of the government sets acquired and used during the accounting period were adapted to receive wireless telegraph signals by other than the heterodyne method. As an example, many sets were equipped not only with heterodyne devices and circuits but with a crystal detector as well.

A fair and reasonable royalty for the use of the defendant's receiving sets for utilizing the inventions of the patents in suit is a base rate of 18 percent of the cost of the sets where apparatus was used entirely for heterodyne reception and with a reduction of compensation in direct proportion to the extent of nonheterodyne use. Thus, where a receiving set was so constructed and intended for heterodyne reception 50 percent of the time, the royalty applicable to such a set would be 9 percent of its cost.

In the accompanying tables, instead of ascertaining the royalty rate and the amount for each item, the computation is simplified by allocating the percentage of cost for heterodyne use, totalling the allocated costs, and applying the base royalty rate to the total.

22. The device utilized in the government radio sets for the production of local oscillations in the receiver consisted of an audion tube or bulb having a filament connected to a supply of energy through suitable controlling means; a grid or input circuit, and a plate or output circuit. The energy input from the tuned or resonant circuits associated with the receiving antenna was applied to the grid circuit, and the telephone head receiver was connected to the output or plate circuit, the tube functioning as a detector.

In addition, an arrangement of circuits known as a feedback circuit coupled the output circuit to the grid circuit. By adjusting the degree of coupling, the tube could be made to oscillate and its oscillations controlled so that a hetero-

dyne beat note could be produced. The coupling device generally used was electromagnetic in character and comprised a coil, the position of which could be magnetically adjusted with reference to a portion of the input circuit. This adjustable coil which produced a feed-back excitation was termed a "tickler coil."

23. For convenience the various types of receiving apparatus are grouped in the following tabulations:

GROUP "A"

Item No.	Type No.	Date of contract or order	Number of units	Cost	Heterodyne use for reception of— Percent continuous waves	Heterodyne use for reception of— Percent damped waves	Resultant percent	Percentage of cost allocated to heterodyne
16	SE-950	1918	321	$99,510.00	25	22.5	47.5	$47,267.25
22	SE-1420	1919	400	61,420.00	40	18	58	35,623.60
25	CE-937	1918	100	30,000.00	25	22.5	47.5	14,250.00
26	SE-1440	1919	147	58,206.35	25	22.5	47.5	27,648.02
33	CN-116	1917	3	1,637.25	25	22.5	47.5	777.69
38	CN-116	1917	29	15,826.75	25	22.5	47.5	7,517.71
46	SE-3650	1919	24	4,800.00	40	18	58	2,784.00
55	CN-115	1917	16	3,883.52	25	22.5	47.5	1,844.67
61	SE-1012-A	1918	250	36,300.00	25	22.5	47.5	17,242.50
63	SE-1420-B	1919	100	15,444.00	40	18	58	8,957.52
63-B	SE-1520	1919	4	1,350.00	40	18	58	783.00
	SE-3650		2					
63-D	SE-1414	1918	10	2,580.50	25	22.5	47.5	1,225.74
63-E	SE-1420	1918	10	4,139.75	40	18	58	2,401.00
63-F	SE-1412	1918	10	1,983.33	25	22.5	47.5	942.08
66	SE-1012	1918	300	82,890.00	25	22.5	47.5	39,372.75
67	SE-950	1919	25	9,530.33	25	22.5	47.5	4,526.90
68	SE-1012	1919	25	9,718.11	25	22.5	47.5	4,616.10
78	(*)	1917	2	485.44	25	22.5	47.5	230.58
94	SE-1530	1919	1	1,339.61	95	1.5	96.5	1,292.72
201	(*)	1918	5	2,250.00	75	7.5	82.5	1,856.25
202	SCR-70	1918	70	10,125.00	25	22.5	47.5	4,809.38
203	SCR-83	1918	39	6,207.00	25	22.5	47.5	2,948.33
204	SCR-70	1918	75	9,026.25	25	22.5	47.5	4,287.47
205	SCR-70	1918	75	8,250.00	25	22.5	47.5	3,918.75
208	SCR-79	1919	252	49,896.00	25	22.5	47.5	23,700.60
210	SCR-77	1918	60	18,000.00	60	12	72	12,960.00
211	SCR-77	1918	10	3,411.10	60	12	72	2,455.99
212	SCR-70	1918	2	270.00	25	22.5	47.5	128.25
216	(*)	1918	50	10,412.50	25	22.5	47.5	4,945.94
217	120	1918	53	27,076.02	25	22.5	47.5	12,861.11
	122		50					
221	AR-2	1917	20	2,000.00	25	22.5	47.5	950.00
222	AR-2	1917	4	400.00	25	22.5	47.5	190.00
232	AR-1-B	1917	20	6,000.00	25	22.5	47.5	2,850.00
233	SCR-99	1918	2	3,878.58	25	22.5	47.5	1,842.33
235	SCR-79-A	1918	294	148,433.50	25	22.5	47.5	70,505.91
	SCR-99		158					
236	SCR-78-A	1918	170	48,085.69	25	22.5	47.5	22,840.70
237	SCR-77	1918	4	2,853.75	60	12	72	2,054.70
239	SCR-79	1918	1	11,400.00	25	22.5	47.5	5,415.00
244	Multiplex	1917	8	10,410.00	75	7.5	82.5	8,588.25
245	Multiplex	1917	6	7,632.80	75	7.5	82.5	6,297.06
			3,207	827,063.13				415,709.85

*No established type number.

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GROUP "B"

Item No.	Type No.	Date of contract or order	Number of units	Cost	Heterodyne use for reception of— Percent continuous waves	Percent damped waves	Resultant percent	Percentage of cost allocated to heterodyne
2	CN-113	1917	150	$37,500.00	25	22.5	47.5	$17,812.50
4	CN-113-A	1917	200	49,757.49	25	22.5	47.5	23,634.81
5	CN-239	1917	100	45,500.00	95	1.5	96.5	43,907.50
6	CN-112	1917	125	31,250.00	25	22.5	47.5	14,843.75
7	SE-143	1917	601	209,749.00	40	18	58	121,654.42
8	CN-240	1917	200	95,000.00	95	1.5	96.5	91,675.00
9	(*)	1917	1	919.45	95	1.5	96.5	887.27
	(*)		1	284.19	40	18	58	164.83
10	SE-143	1917	250	102,062.50	40	18	58	59,196.25
11	CN-113-A	1917	600	150,000.00	25	22.5	47.5	71,250.00
12	CN-240	1917	100	45,125.02	95	1.5	96.5	43,545.64
13	SE-143	1917	150	45,000.00	40	18	58	26,100.00
14	SE-143	1918	400	116,000.00	40	18	58	67,280.00
15	SE-899	1918	200	62,000.00	95	1.5	96.5	59,830.00
17	SE-952	1918	29	9,055.00	25	22.5	47.5	4,301.13
18	SE-899	1918	301	59,598.00	95	1.5	96.5	57,512.07
19	SE-998	1918	50	14,750.00	25	22.5	47.5	7,006.25
20	CF-753	1917	50	25,750.00	95	1.5	96.5	24,848.75
21	SE-143	1917	200	55,000.00	40	18	58	31,900.00
23	SE-1220	1918	300	90,300.00	40	18	58	52,374.00
24	CN-113	1918	300	39,360.00	25	22.5	47.5	18,696.00
27	SE-1220	1918	200	35,200.00	40	18	58	20,416.00
37	CS-107	1917	52	10,920.00	25	22.5	47.5	5,187.00
39	CN-114	1917	60	27,478.80	25	22.5	47.5	13,052.43
40	CN-112	1917	20	4,793.20	25	22.5	47.5	2,276.77
41	CW-106	1917	15	3,640.80	25	22.5	47.5	1,729.38
42	CN-112	1917	110	26,342.60	25	22.5	47.5	12,512.74
43	CN-112	1917	15	3,300.00	25	22.5	47.5	1,567.50
44	CN-112	1917	50	12,136.00	25	22.5	47.5	5,764.60
50	CN-208	1918	1	507.50	25	22.5	47.5	241.06
58	CN-112	1917	35	8,388.10	25	22.5	47.5	3,984.35
60	CN-112	1917	52	12,462.32	25	22.5	47.5	5,919.60
63-A	CN-112	1918	50	11,983.00	25	22.5	47.5	5,691.93
72	CN-114	1917	6	2,747.88	25	22.5	47.5	1,305.24
80	CS-107	1917	5	1,050.00	25	22.5	47.5	498.75
81	CN-112	1917	2	2,082.00	25	22.5	47.5	988.95
88	SE-1512	1919	200	33,691.03	25	22.5	47.5	16,003.24
107	CM-294-C	1917	200	73,200.00	25	22.5	47.5	34,770.00
206	SE-899	1918	27	8,370.00	75	7.5	82.5	6,905.25
207	SCR-50	1917	100	40,800.00	25	22.5	47.5	19,380.00
217	118	1918	12	3,154.49	25	22.5	47.5	1,498.38
227	Cohen	1918	1	500.00	25	22.5	47.5	237.50
228	Cohen	1918	1	460.00	25	22.5	47.5	218.50
229	Cohen	1918	3	660.00	25	22.5	47.5	313.50
230	(*)	1918	2	2,647.36	25	22.5	47.5	1,257.50
231	Cohen	1917	2	1,120.00	25	22.5	47.5	532.00
261	Sperry 1	1917	3	570.00	25	22.5	47.5	270.75
			5,532	1,612,165.73				1,000,943.09

*No established type number.

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GROUP "C"

Item number	Type number	Date of contractor order	Number of units	Cost	Heterodyne use for reception of— Percent continuous waves	Percent damped waves	Result and per cent	Percentage of cost allocated to heterodyne
242	AR-4	1917	100	$12,850.00			20	$2,570.00
243	AR-4	1917	500	44,943.75			20	8,988.75
248	RC-1-A	1918	1,000	60,500.00			20	12,100.00
249	SCR-54-A	1918	1,848	100,004.88			20	20,000.98
250	SCR-54-A	1918	2,000	120,521.75			20	24,104.35
252	SCR-54-A	1918	1,452	86,771.52			20	17,354.30
253	SCR-54	1917	250	28,341.62			20	5,668.32
254	SCR-54	1917	250	25,177.50			20	5,035.50
255	SCR-54-A	1918	2,000	121,000.00			20	24,200.00
256	RC-1-A	1918	2,500	151,250.00			20	30,250.00
			11,900	751,361.02				150,272.20

GROUP "D"

47	SE-1071	1918	500	$20,050.00	35	39	74	$14,837.00
48	CF-122	1917	45	10,710.00	35	39	74	7,925.40
49	CF-122	1917	200	44,323.18	35	39	74	32,799.15
56	CF-122	1917	200	43,500.00	35	39	74	32,190.00
57	CF-122	1918	200	43,750.00	35	39	74	32,375.00
62	SE-1071	1918	750	37,500.00	35	39	74	27,750.00
217	119	1918	12	3,154.49	25	22.5	47.5	1,498.38
			1,907	202,987.67				149,374.93

GROUP "E"

242	AR-5	1917	100	$12,850.00			20	$2,570.00
243	AR-5	1917	500	44,943.75			20	8,988.75
251	SCR-55	1918	251	6,512.50			20	1,302.50
260	SCR-55 (DT-3)	1917	500	5,624.00			20	1,124.80
			1,351	69,930.25				13,986.05

GROUP "F"

63-C	SE-1278	1918	6	$1,683.76	100		100	$1,683.76
63-G	SE-1697	1919	4	584.90	100		100	584.90
209	(*)	1918	20	2,924.40	100		100	2,924.40
			30	5,193.06				5,193.06

* No established type number.

GROUP "G"

Item No.	Type No.	Group	Date of contract or order	Number of units	Cost	Heterodyne use for reception of— Percent continuous waves	Percent damped waves	Resultant percent	Percentage of cost allocated to heterodyne
1	CF-83	B	1916	12	$6,384.45	95	1.5	96.5	$6,160.99
	(*)	B		1	284.19	40	18	58	164.83
3	CN-239	B	1917	40	18,200.00	95	1.5	96.5	17,563.00
	CN-208	B		27	13,902.00	25	22.5	47.5	6,603.45
29	Cohen Ba	B	1915	12	3,186.57	95	1.5	96.5	3,075.04
30	Cohen Ba	B	1915	30	7,804.71	95	1.5	96.5	7,531.55
31	1917	B	1916	1	557.88	100		100	557.88
34	AGT	B	Unknown	4	400.00			50	200.00
35	1917 (SE-143-A)	B	1916	183	59,760.23	40	18	58	34,660.93
51	CN-55	B	1916	12	1,764.00	25	22.5	47.5	837.90
52	(*)	B	1916	1	347.29	95	1.5	96.5	335.13
	(*)	B		1	557.88	100		100	557.88
	CN-91	B		12	6,069.74	40	18	58	3,520.45
53	CF-78	D	1916	85	19,550.00	35	39	74	14,467.00
54	CF-78	D	1916	100	23,000.00	35	39	74	17,020.00
63-H	(*)	D	1914	30	3,622.50	35	39	74	2,680.65
	(*)	D		4	483.00	35	39	74	357.42
	(*)	D		2	3,338.10	40	18	58	1,936.10
69	Cohen Ab	B	1915	12	4,143.81	40	18	58	2,403.41
71	(*)	D	1915	49	14,003.07	35	39	74	10,362.27
74	(*)	D	1915	100	11,494.00	35	39	74	8,505.56
77	(*)	D	1916	25	4,750.00	35	39	74	3,515.00
89	I-P-76 1914	X	1913	10	9,369.47			50	4,684.74
	I-P-76 1912			20					
90	I-P-111-L	X	1913	50	5,856.72			50	2,928.36
96	I-P-76	X	1915	4	2,040.00			50	1.020.00
97	I-P-76	X	1915	15	4,040.00			50	2,020.00
98	P-2	D	1915	50	9,500.00	35	39	74	7,030.00
100	Cohen A	B	Unknown	20	5,911.00	40	18	58	3,428.38
101	Cohen Aa	B	1915	24	6,220.80	40	18	58	3,608.06
102	Cohen Aa	B	1915	4	1,017.28	40	18	58	1,017.28
103	Cohen Ab	B	1915	20	6,722.21	40	18	58	3,898.88
104	Cohen Cb	B	Unknown	24	3,420.96	25	22.5	47.5	1,624.96
105	Cohen C	B	1915	1	142.54	25	22.5	47.5	67.71
106	Cohen Ca	B	1915	25	3,563.50	25	22.5	47.5	1,692.66
218	Cohen	B	1916	24	10,056.00	25	22.5	47.5	4,776.60
223	SCR-50	B	1917	24	10,308.00	25	22.5	47.5	4,896.30
225	RJ-6	A	1917	1	149.73	25	22.5	47.5	71.12
240	Cohen	B	1915	4	1,200.00	25	22.5	47.5	570.00
				1,063	283,121.63				185,924.23

*No established type number.

Certain contracts, abstracts, and other documents, plaintiffs' exhibits 100–138, inclusive, 249–272, inclusive, and 282, which are made a part of this finding by reference, comprise in general the sources of information for these tables, and the item numbers given in the first column of the tables

identify the various items set forth in the contracts and abstracts.

In order to obviate the expense of photostat copies, many requested documents were made available to plaintiffs' representative, who examined them and made abstracts of their contents, and testified without objection regarding them.

24. The tabulation termed group "A" relates to receiving apparatus comprising a radio receiving set, including an audion tube and its controls built in and forming an integral portion of the set. The sets also included a tickler coil or other similar feed-back means to make the tube oscillate and to control its oscillations by adjustment under the control of the receiving operator. When the tube was oscillating, the apparatus utilized the inventions in suit for heterodyne reception of wireless signals.

Sets in this group were also provided with a crystal detector or terminals for connecting a crystal detector. With the tickler so adjusted that the tube was not oscillating, or when the crystal detector was used, the set could be used for reception of other than continuous wave signals, and when so used there was no heterodyne effect.

25. Certain of the receiving sets acquired for use by the government during the accounting period, instead of being constructed as integral sets, as exemplified by the apparatus in group "A," had the apparatus divided and placed in separate units or boxes. In general, one unit or box contained the necessary elements and circuits for tuning the receiver, this unit normally being referred to as a "tuner." The second unit normally contained an audion bulb with its necessary adjuncts and controls and was termed "audion control box."

The tabulation termed group "B" relates to tuning units. The tuning units of this group were adapted to be used either with a crystal detector or with an audion control box. The tuner units were, however, provided with a built-in tickler coil or other equivalent means for causing the audion tube in an associated audion control box to oscillate, and when thus used the set was caused to operate by the heterodyne method. The tuning unit, when used with either

a crystal detector or with an associated audion control box with the audion not oscillating, did not involve the inventions in suit. As the tuners could be used either with or without the heterodyne method in accordance with the desires of the receiving operator, the tabulation for group "B" contains a percentage allocation for heterodyne use.

26. The tabulation termed group "C" is similar to that of "B" in that it relates to a separate tuner unit. These units however had no built-in tickler coil. They were primarily designed, adapted and intended for use with the crystal detector for spark reception. They were however wired and fitted with binding posts so that the audion control box of group "E" could be readily connected. By attaching an external tickler coil to binding posts marked "tickler" on the audion control boxes of group "E" or by connecting one of the internal coils of the tuner unit of group "C" by means of a feed-back circuit with an audion control box of group "E", the two units would produce a beat note and could be used for heterodyne reception.

Signal Corps Radio Communication Pamphlet numbers 3 and 4 (plaintiffs' Exhibits 255 and 256) give instructions as to the use of the sets SCR–54 and SCR–54–A for receiving by the heterodyne method.

The tabulation for group "C" contains the percentage allocated to these sets for heterodyne use.

27. The tabulation entitled group "D" comprises audion control boxes consisting of the tube mounting, battery control, and the necessary connections for the operation of the audion tube. These units were of themselves of no utility for radio reception unless they were connected to a receiver, such as one of the tuning units of group "B" or "C", and when connected to such tuning units and operated by throwing the tube into oscillation could receive by the heterodyne method.

The combined set could also be used for receiving with the audion not oscillating, in which case there was no use of the heterodyne. This combination of an audion control box and the tuning unit was intended and provided for in the design both of the tuning units of groups "B" and "C" and in the design of the audion control boxes of group

"D." The tabulations contain the heterodyne factor for the estimated heterodyne use of this apparatus.

28. The apparatus contained in schedule "E" consists of audion control boxes designed, adapted, and intended to be connected to a tuner of group "C." These audion control boxes had provision in the way of tickler coil terminals for the attachment of a tickler coil or its eqivalent in the way of a feed-back circuit and consequently were intended to be used when desired for heterodyne reception.

The tabulation for this group contains a percentage allocation of 20 percent applied to these sets for heterodyne use.

29. The apparatus set forth in group "F" consisted of small continuous wave oscillating transmitters adapted to produce high-frequency oscillations at a frequency under the control of the operator. Such apparatus was used with an associated receiving set for producing heterodyne action by combining the impulses of a received signal with the impulses generated by the local oscillator to produce heterodyne beat reception. The oscillators so used were called heterodyne drivers.

30. The tabulation entitled group "G" relates to apparatus designed, adapted, or intended to be used by defendant during the accounting period for radio reception by the heterodyne method, but the contracts or orders under which the listed apparatus was acquired were dated prior to February 5, 1917 (six years before the filing of the original petition in this suit).

The third column of this tabulation indicates in which of the other groups this apparatus would be classified as to structure. The items marked X in this column relate to receivers which were originally designed and adapted for use with a crystal or other similar detector.

When the oscillating audion and heterodyne reception were adopted by the Navy there were many of these receivers (X items) already in use by defendant for non-heterodyne reception. Some of these were used for heterodyne reception during the accounting period by attaching an audion control box and causing the audion bulb to oscillate. This was done in some cases by the use of an interme-

diate coupler including a tickler coil, and in others a circuit known as an ultra-audion circuit was used.

The record shows that all of the units set forth in this schedule were paid for, as evidenced by an inspection of various public bills and records at the Washington disbursement department at the Navy Department, Washington, D. C., and in the accounting department of the Washington Navy Yard. The record does not show the date of delivery or acquirement by the defendant of the apparatus contained in group "G."

The tabulation for group "G" also contains the percentage allocated to the various sets contained therein for heterodyne use.

31. The following tabulation gives the totals from the various schedules as indicated:

Group	Number of units	Total cost	Percent cost allocated to heterodyne
A	3, 207	$827, 063. 13	$415, 709. 85
B	5, 532	1, 612, 165. 73	1, 000, 943. 09
C	11, 900	751, 361. 02	150, 272. 20
D	1, 907	202, 987. 67	149, 374. 93
E	1, 351	69, 930. 25	13, 986. 05
F	30	5, 193. 06	5, 193. 06
G	1, 063	283, 121. 63	185, 924. 23
	24, 990	3, 751, 822. 49	1, 921, 403. 41

32. A reasonable and entire compensation for the use of the Fessenden inventions in suit is 18 percent of the total cost allocated to the heterodyne use in the accompanying schedules, or the sum of $345,852.61, plus an amount measured by interest at 5 percent per annum, not as interest but as a part of the entire or just compensation, on $345,852.61 from the middle of the accounting period, or November 11, 1918, to date of payment of the judgment.

The sum of $345,852.61 as applied to the 24,990 receiving units represents an average royalty of 9.22 percent or $13.84 per unit.

33. Plaintiffs did not delay unreasonably in the circumstances in taking the proof in this and its companion case, No. 34664, which cases were tried together.

The court decided that the plaintiff, the International Devices Company, was entitled to recover $345,852.61, plus an additional amount measured by interest at 5 percentum, not as interest but as a part of the entire or just compensation, on the principal sum from the middle of the accounting period, November 11, 1918, to date of payment of the judgment.

LITTLETON, *Judge*, delivered the opinion of the court:

As set forth in the findings the government during the accounting period manufactured, or had manufactured for it, and used 24,990 wireless receiving units, or sets, embodying and utilizing the heterodyne inventions covered by certain patents issued to Reginald A. Fessenden, Nos. 1,050,441 and 1,050,728. The heterodyne inventions included in some of these wireless telegraph receiving units were not, as explained in the findings, exclusively used at all times by the government, and, for the purpose of determining the reasonable and entire compensation to which the owner of the patents is entitled measured by a reasonable royalty on the cost of the receiving units, the percentage of the total gross cost of such receiving units embodying the heterodyne inventions properly to be allocated to heterodyne use or reception, as has been reasonably established by the evidence, is set forth in the findings. The total gross cost of these receiving units embodying the heterodyne inventions was $3,751,822.49, and the percentage of this cost, shown by the evidence to be properly allocable to heterodyne use of the receiving units, is $1,921,403.41. See finding 31.

The principal sum of $689,584.64 claimed is made up of three items. Under the first item plaintiffs ask for partial compensation in the principal amount of $194,787.45 in the form of base royalty of 10 percentum of the total cost of the receiving units, *per se*, which embodied the heterodyne invention, the 10 percentum being reduced in proportion to the nonheterodyne use of receivers, or 4.8%, resulting in a net royalty of 5.2% of the cost of the receiving units.

Under the second item plaintiffs ask partial compensation of the principal sum of $136,374.33 in the form of a royalty

of 5 percentum of the total cost of continuous wave transmitters, *per se*, acquired, constructed, and used by the government for sending wireless telegraph signals, such percentum being proportionately reduced to the extent that the specific transmitting apparatus had any uses not involving continuous-wave radio telegraph service.

Under the third item plaintiffs ask for partial compensation in the sum of $333,543.10 measured by a royalty of 5 percentum of the government's capital investment in its permanent long-distance transmitting and receiving wireless telegraph communication network, in connection with which communication system it used the heterodyne inventions.

The defendant takes the position that plaintiffs' reasonable and entire compensation should be measured by a reasonable royalty on the cost of the receivers only, and that plaintiffs are not entitled to include in such compensation any amount measured by the cost of transmitters not utilizing the heterodyne invention, nor a percentage of the government's capital investment during the accounting period in its long-distance wireless communication network.

The defendant also contends that the reasonable royalty which should be allowed for use by the government of the heterodyne inventions should be 10 percentum of the cost of the receivers in groups A and F (finding 23), namely, 10 percentum of $244,605.71, or $24,460.57.

As to groups B, C, D, and E (finding 23), the defendant makes the argument that the evidence is not sufficient to show use by the defendant of the heterodyne inventions in the receiving units listed in these groups during the accounting period, or, if the inventions were used, the proper percentage of such use, and that, therefore, the claim for compensation based on these receiving units should be dismissed for lack of proof of infringement.

The question of what is a reasonable royalty under all the facts and circumstances disclosed by the record for the use by the government of the heterodyne inventions, covered by the patents in suit, is a question of fact. From a consideration of all the evidence and in view of the basic or pioneer character of the heterodyne inventions covered by these patents and their value and importance in the related art, we

have determined and found that a reasonable royalty is 18 percentum of the cost of the receivers exclusively used for heterodyne reception and the same percentage of the cost shown by the evidence to be properly allocable to heterodyne use of receivers embodying the heterodyne invention, to the extent that they were used for such heterodyne reception. See findings 31 and 32. This royalty is, in our opinion, a fair and proper measure of the principal sum of reasonable and entire compensation to which the owner of the patents is entitled.

Items 2 and 3 of plaintiff's claim for compensation measured by a percentage on the cost to the defendant of wireless telegraph transmitting facilities and of the government's capital investment in its wireless telegraph communication network cannot be allowed. Transmitters, such as were used by the defendant during the accounting period, were old in the art at the time of issuance of the patents in suit and the novel and patentable features covered by the patents in suit are limited by the doctrine announced by the Supreme Court in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, to apparatus for and method of receiving wireless communications. During the accounting period means for radio telegraph transmission and reception were available and were used without utilizing the heterodyne invention. The evidence further shows that the tone-wheel method for reception of long-distance wireless telegraph communication could be used and was used to some extent in receiving trans-Atlantic wireless telegraph communications. It was not by any means as efficient or as satisfactory for this purpose as the inventions covered by the patents in suit, and, therein, we think lies the great merit and value of the heterodyne invention.

Other patents cited by the defendant, issued long after the patents in suit to Vreeland for an electrical circuit by which the received signal current and the locally produced oscillating current are caused to flow in a common conductive circuit, to be there rectified, and to De Forest for the three-electrode vacuum tube circuits were important contributions as subsequent steps to the radio art, but they did not supplant the Fessenden heterodyne inventions. The Vree-

land circuit was of great practical value in the art and the De Forest oscillating tube simplified and improved the operation of the Fessenden heterodyne inventions through amplification and by providing a better local oscillator than had been known before. These patents have been given proper consideration in arriving at the reasonable royalty of 18 percentum to which we think, upon the whole record, the owner of the patents in suit is entitled.

Judgment will be entered in favor of the International Devices Company for $345,852.61 plus an additional amount measured by interest at 5 percentum per annum from November 11, 1918, to date of payment of the judgment herein, not as interest but as a part of the entire or just compensation. It is so ordered.

MADDEN, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

NATIONAL ELECTRIC SIGNALING COMPANY, PAUL H. BYERS, RECEIVER OF NATIONAL ELECTRIC SIGNALING COMPANY, AND INTERNATIONAL RADIO TELEGRAPH COMPANY, NOW INTERNATIONAL DEVICES COMPANY, v. THE UNITED STATES

[No. 34664. Decided May 3, 1943. Plaintiffs' motion and defendant's motion for new trial overruled October 4, 1943.]

On the Proofs

Patents; compensation for infringement.—Fessenden patents 1,050,441 and 1,050,728, relating respectively to apparatus for and a method of radio communication, held valid and infringed by the Government, under the decision of March 13, 1933, 77 C. Cls. 87.

Same; compensation for infringement.—Where Government used at its wireless telegraph station, without owner's consent, patents covering inventions relating to structure and method of transmitting electric signals, a proper measure of reasonable and entire compensation to which owner of patent is entitled is a reasonable royalty based on cost to the Government of radio receivers embodying patented inventions.

Same; measure of compensation.—Upon all the evidence adduced upon accounting and in view of the basic or pioneer character of the heterodyne inventions covered by the patents in question, and their value and importance in the related art; it is *held* that a reasonable royalty for the use of the receiving sets involved in the instant case is 18 percent of the cost of the sets where the sets were used entirely for heterodyne reception, plus interest at 5 percent per annum, not as interest but as a part of the entire or just compensation.

The Reporter's statement of the case:

Mr. Jo. Baily Brown for the plaintiffs.

Mr. Clifton V. Edwards, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Mr. J. F. Mothershead and *Mr. T. Hayward Brown* were on the brief.

The patents involved in this case were held valid and infringed in the findings and opinion published in 77 C. Cls. 87. The question now for determination is the amount of reasonable and entire compensation under the Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, 40 Stat. 704, for the use by the defendant without the consent of plaintiffs of the patented inventions at the Wireless Telegraph Station at Tuckerton, N. J., which was controlled and operated by the defendant during the period September 9, 1914, to April 6, 1917.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. This is a patent suit filed to recover the reasonable and entire compensation for the unauthorized use by the United States at the Tuckerton, New Jersey, trans-Atlantic Wireless Station of inventions covered by certain United States patents issued to Reginald A. Fessenden.

The court in its special findings of fact and opinion of March 13, 1933, (77 C. Cls. 87), held that Fessenden patent 1,050,441 was valid and infringed as to claims 1–4, inclusive, 6, 9, 22–25, inclusive, and 29, and that Fessenden patent 1,050,728 was valid and infringed as to claims 1 and 2. These patents are known as the "heterodyne" patents.

2. The accounting period in this case is from September 9, 1914, when the United States took control of the Tuckerton Station and commenced commercial operation of it, to April 6, 1917, when the United States declared war on Germany, after which the station was used by the United States exclusively for military purposes.

The two Fessenden patents which form the basis of this accounting relate respectively to apparatus for (patent 1,050,441) and a method of (patent 1,050,728) radio communication.

3. In so far as the present accounting is concerned, it is limited to radio telegraphy in which letters and symbols are represented by certain groupings of dots and dashes produced at the transmitting station by a telegraph key which is closed for a relatively short interval to form a dot and for a longer interval to form a dash. These signals are conveyed from the receiving apparatus to the ear of the operator at the receiving station by means of a telephone receiver, or equivalent device, as sounds of short or long duration, and as the message is received the receiving operator re-transcribes these sounds into the original letters and symbols.

The pitch or frequency of the sound produced in the telephone receivers at the receiving station must be within the perception range of the human ear or, to use radio terminology, must be of "audio-frequency". By way of example, a tone having a frequency of 500 cycles per second produces a well-defined musical note.

4. In the transmission of energy from the transmitting antenna to the receiving antenna it is necessary to utilize alternating currents of extremely high frequency, these sometimes being in the nature of one million cycles per second. These high frequency or "radio-frequency" currents are produced by a suitable generating means at the transmitting station and caused to flow in the antenna circuit. Energy is radiated from that antenna at a wave-length determined by this "radio-frequency," some of this energy being picked up by the receiving antenna which is tuned to respond to that particular radio-frequency.

The energy flowing in the transmitting antenna may be broken up into periods of short or long duration by means of a telegraph key, but as this radio-frequency is far above the range of audibility it is necessary to modulate the radio-frequency energy at an audio-frequency either at the transmitting station or at the receiving station in order to transmit intelligence.

One of the features of the heterodyne patents in suit relates to the production of an audio-frequency at the receiving station.

5. Two systems were available for use at the beginning of the accounting period in which the audio-frequency modulation was performed in the receiving system. They were as follows:

(a) The tikker. One conventional form of tikker was a rotating brass wheel having a fine steel wire making a light contact in a groove on the periphery of the wheel. The slight irregularities in the surface of the wheel caused the circuit to open and close at more or less irregular intervals. When the circuit was open a condenser in the receiving circuit became charged and when the circuit was closed the condenser discharged. These irregular discharges passed through the telephone head set, each one causing a click. The speed of the rotating disc was such that the clicks followed each other so closely that they resulted in a sound in the telephone head set best described as being "hissing" or "mushy" in character. The sound produced was of this character rather than that of a musical tone because of minute irregularities on the periphery of the wheel, which in turn caused the condenser to charge and discharge in an irregular manner.

(b) The tone wheel. In the method of tone wheel reception the basic element also comprised a motor-driven rotating member. In this case the member was a rotating wheel having a relatively large number of conducting teeth or contact segments on its periphery. Each contact segment was separated from the preceding segment on the periphery by an insulating segment of exactly the same peripheral width. A stationary contact brush was mounted to press against the periphery of the wheel so that, as the same rotated,

the electrical circuit thus formed was alternately opened and closed, the duration of the open period being exactly the same as the closed period.

The tone wheel was driven by an electric motor, the speed of which could be readily adjusted by means of a control knob. The rotational speed of the disc and the number of contact segments on its periphery were so selected that the interruptions produced had substantially the same frequency as the received high-frequency energy. The received continuous wave current was passed through the brush and tone wheel contacts to the head telephones. If by means of the speed-adjusting knob a speed was selected at which the frequency of interruptions by the tone wheel were exactly in step with the cycle of the high-frequency current, no sound would be heard in the telephones, the resultant interruptions of the current by the tone wheel occurring at a fixed relationship with the cycle of the incoming high-frequency and being above audio-frequency.

If, however, the speed of the tone wheel was adjusted so that it was either slightly faster or slower than the synchronous speed, the interruptions of the tone wheel either gradually overtook or lagged behind the individual cycles of the high-frequency current, thereby causing a relatively slow periodical change (at audio-frequency) in the current flowing to the telephones whenever the transmitting key was depressed.[1] The operation of the tone wheel thus introduced

[1] A crude mental picture of the operation of the tone wheel may be had by visualizing as the received high-frequency energy a freight train traveling at 60 miles an hour and made up of alternate box cars and flat cars of the same length. If the tone wheel be now visualized as a second similar freight train with alternate box cars and flat cars traveling on a parallel track, it will be evident that if both trains travel in the same direction at exactly 60 miles an hour there will be no relative movement and no relative effect between the two trains traveling side by side.

If, however, the speed of the second train (the tone wheel) is either increased or decreased, to 61 miles per hour or 59 miles per hour, there will be a relatively slow movement of one train with respect to the other at a speed of but one mile per hour, and at this relatively low speed the box cars in the second train will either gradually overtake or lag behind the box cars of the first train, so that the box cars of the second train will slowly pass the flat cars of the first train and again come into step with the box cars of the first train.

If it be assumed that sunlight was shining across the two tracks the amount of light shining through the two trains will be a minimum when a box car is opposite a flat car and will slowly become a maximum when the box cars are in step with each other.

an audio-frequency component into the received currents, the pitch of which was dependent upon the extent to which the tone wheel is out of synchronism.

The tone wheel possessed the following advantages:

(1) The range of audible tone frequency was relatively narrow, so that it was possible to select the particular station whose signal it was desired to receive to the exclusion of other stations transmitting at the same time.

(2) The sound received by the telephones was in the nature of a musical tone, the pitch of which could be varied by the receiving operator by adjustment of the control knob of the driving motor. The operator was therefore able to select any desired musical note or pitch that gave to his ear a maximum audibility and which he could distinguish from other signals of different pitch or from the irregular noises produced by static.

6. The tone wheel possessed one disadvantage in common with the tikker. In each of these devices the received energy, which was minute in character, had to flow through a brush bearing on the periphery of a rotating member. The contact between the brush and the rotating member was delicate in character and could easily get out of adjustment.

A second disadvantage arising from the use of the tone wheel was that the receiving circuit was interrupted or opened one-half of the time, and therefore one-half of the received energy was lost, although this did not of necessity mean a corresponding loss in signal strength heard in the telephones.

A third disadvantage in the use of the tone wheel existed in the fact that the pitch of the audio-frequency tone was dependent upon the maintenance of an absolutely steady speed of the driving motor, and any variation in this speed would cause a change in the pitch of the tone or, if the variation were great enough, an entire loss of the signal.

7. Both of the Fessenden patents, upon which the present accounting is predicated, eventuated from the same original patent application and both patents disclose the same apparatus and construction. Patent 1,050,441 carries the claims directed to structure and patent 1,050,728 has claims directed to a method.

Both of these patents relate to the reception of signals by means of continuous high-frequency energy impressed upon the antenna at a receiving station. As stated in patent 1,050,728—

> The primary object of my invention is to eliminate interference and increase the intensity of signals, by operating the indicator at the receiving station by the conjoint energy of the received electric impulses, and certain cooperating currents produced locally at the receiving station. This application furthermore contemplates the production of signals by means of harmonic beats produced between the currents of the received electric pulses and the locally produced cooperating electric pulses, the indicator being moved by the energy of the combined currents and therefore being under control, as to the frequency of motion, by the receiving operator.

One of the objects indicated by the patent specifications is the production of an audio-frequency modulation at the receiving station.

The essential feature of both patents is that there is located at the receiving station a local source of continuous high-frequency oscillations, the frequency of which is controllable by the receiving operator. When high-frequency energy is received by the receiving antenna and the receiving circuits of the receiver, the high-frequency oscillations from the local source are also impressed upon the receiving circuit, and these local oscillations are so adjusted by the receiving operator as to differ slightly from the received oscillations from the transmitting station.

These two sets of oscillations interact to produce a beat note or tone, the resultant frequency of which is the difference in frequency between the oscillations received from the distant transmitting station and the oscillations produced by the local oscillating system at the receiving station, a proper selection of the local oscillations thereby resulting in producing a tone or signal of audio-frequency.

8. In the particular embodiment selected for illustration in the patents in suit the local high-frequency oscillations are generated by a high-frequency alternator driven by an electric motor, the speed of which is controlled by means of

a speed-adjusting knob or rheostat. If by this means a speed was selected at which the frequency of the local oscillations were exactly in step with the oscillations of the high-frequency current in the receiving antenna, no sound would be heard in the telephone. If, however, the speed of the local high-frequency generator was adjusted so that it was either slightly faster or slower, and the local oscillations were no longer synchronous with the received oscillations, the peaks of the local oscillations either gradually overtook or lagged behind the individual peaks of the received high-frequency current, thereby causing a relatively slow interacting periodical change (at audio-frequency) in the impulses acting upon the telephone diaphragm. A musical tone was thus produced in the telephone, the pitch of which was under the control of the receiving operator.

9. The patents are not limited to the particular embodiment referred to in the previous finding.

On pages 1 and 2 of patent 1,050,728, it is stated—

> As a frequency controlling device, it is preferred to use a high frequency alternator, or any other suitable device for producing unintermittent oscillations, * * * .
> While a variety of forms of receiving devices may be employed, the construction shown in Fig. 3 is convenient and desirable.

In patent 1,050,441 it is suggested that a mercury lamp producing oscillations, or any other suitable source for producing unintermittent oscillations, may be used.

10. Claims 1, 2, 3, 4, 6, 9, 22–26, inclusive, and 29 of the structure patent 1,050,441 are valid and have been infringed by defendent during the accounting period. Claims 25 and 29 may be taken as typical and are as follows:

> 25. In wireless telegraph apparatus for transmitting energy, the combination of a transmitting station having apparatus for sending practically continuous high frequency oscillations, a receiving station, a receiver at the receiving station and a source of practically continuous high frequency oscillations operatively connected to the said receiver, substantially as described.
> 29. Electric signaling apparatus comprising a receiving station having an absorbing circuit, an indicator, a

local generator of alternating current of frequency different from that of the received current, and means to operate said indicator by beats produced thereby in conjunction with the received current.

11. Claims 1 and 2 of the method patent 1,050,728 are valid and have been infringed by defendant during the accounting period. These claims are as follows:

1. In the art of electric signaling, the method which consists in moving an indicator at the receiving station by the interaction of the received impulses forming the signal, and a series of sustained electric impulses locally produced at the receiving station and maintained with a frequency near to but not the same as the frequency of the received impulses.

2. In the art of signaling, the method which consists in making an indication by the interaction of received impulses of sustained frequency and amplitude with impulses of neighboring frequency generated by a constantly acting local source of energy at the receiving station.

12. Some of the advantages possessed by the heterodyne system of reception as predicated upon the patents in suit are summarized as follows:

(a) A narrow range of audible tone frequency contributed to the ability to select a particular station whose signal it was desired to receive to the exclusion of other stations transmitting at the same time.

(b) The exclusion of static noises and extraneous stations transmitting near the same wave length due to the ability of the operator to select any desired musical pitch that gave to his ear a maximum audibility.

(c) The combination of the locally generated energy at the receiving station with the received signal energy produced a selective amplification of the signal, or an increase of audibility which resulted in an increased range of reception of signals over the prior art systems with the utilization of the same amount of energy at the transmitting station.

The advantages set forth in (a) and (b) resemble the advantages present in reception by the tone wheel (see Finding 5), with the distinction that the Fessenden heterodyne system obviated the use of any delicate rotating contacts or

loss of energy by a periodic interruption of the current and was more rugged and simple in character.

The term "selective amplification" as used in advantage (c) refers to an amplification effect dealing only with the desired selected or heterodyned signal in contradistinction to amplification or amplifiers used in radio reception in which the desired signal and the extraneous background noises are both amplified.

13. The practical effect resulting from the use of the Fessenden heterodyne system was the creation of a more selective, sensitive, and rugged receiver by means of which signals could be received from a transmitting station of given power over an increased distance as compared with the prior art receivers. Messages could be received under conditions of static and interference where the prior art receivers would not operate to receive intelligible signals.

The heterodyne patents in suit were basic or pioneer in character and the inventions covered therein have been of great value in the radio art.

14. In the early part of 1913 or shortly prior thereto a German company, Hoch-Frequenz Maschinen Aktiengesellschaft fur Drahtlose Telegraphie (hereinafter referred to as 'Homag"), began construction of a pair of trans-Atlantic radio telegraph stations. One station was located at Tuckerton, New Jersey, and the corresponding German station at Eilvese, Germany. As constructed, each station comprised a continuous wave transmitter and a receiver of the tone wheel type.

By July 1913 the transmitter at Eilvese had been completed and signals were sent and received by the tone wheel receiver at Tuckerton, New Jersey.

Installation of the transmitter at the Tuckerton Station was completed in the spring of 1914, and the Tuckerton Station began to transmit messages in April or May of that year.

15. In June of 1914 tests were made of two-way wireless telegraph communication between Tuckerton and its corresponding German station at Eilvese. The Tuckerton Station was then shut down in preparation for an enlargement of the station, including an additional powerhouse, an electric

power line from Atlantic City as reserve power, and an additional receiving station located sufficiently distant from the transmitting station at Tuckerton to permit simultaneous reception and transmission of signals.

16. The day after the outbreak of the European war (August 4, 1914) cable communication between the United States and Germany was terminated by cutting the cables, and the Tuckerton Station started the next day in an attempt to transmit and receive messages to and from Eilvese on a commercial basis.

From August 6 to September 9, 1914, the station both transmitted and received commercial messages, with an increase in the volume of traffic throughout this period.

17. On September 9, 1914, the Tuckerton Station was seized by the Secretary of the Navy under Executive Order No. 2042, dated September 5, 1914, the purpose and intent of this order being expressed by the following quotation therefrom:

> Whereas an order has been issued by me dated August 5, 1914, declaring that all radio stations within the jurisdiction of the United States of America were prohibited from transmitting or receiving for delivery messages of an unneutral nature and from in any way rendering to any one of the belligerents any unneutral service; and
>
> Whereas it is desirable to take precautions to insure the enforcement of said order insofar as it relates to the transmission of code and cipher messages by high-powered stations capable of trans-Atlantic communication: * * *

The Secretary of the Navy upon taking control of the Tuckerton Station immediately replaced the German operators at Tuckerton with Navy personnel, and thereafter, throughout the accounting period, the management, control, and operation of the station were exclusively and entirely under the control of the Secretary of the Navy.

In a few weeks after taking over the station the Navy personnel discarded the tone wheel receiver previously installed at the Tuckerton Station and installed one or more receivers embodying the use of audion tubes, a three-stage audio-frequency amplifier, and the heterodyne system and method of receiving continuous wave signals as covered by

the patents in suit. The heterodyne method was utilized in the operation of the station from the time of its installation until April 6, 1917. On this latter date, which terminates the accounting period, the United States declared war on Germany and commercial operation of the Tuckerton Station ceased.

18. The use of the heterodyne method of reception at Tuckerton as covered by the patents in suit was an improvement over the tone wheel and facilitated the reception of messages from the Eilvese station.

It only indirectly affected the transmission of messages from Tuckerton to Eilvese, in that the traffic capacity of a transmitter is dependent upon the ability to get confirmation of the receipt or nonreceipt of a complete message which is transmitted, and to check and correct errors.

19. During the period of commercial operation under the supervision of the Navy Department, the Tuckerton Station received from Eilvese 876,788 paid words and transmitted to Eilvese 1,270,471 paid words.

The international custom of the 1914–1917 period was for corresponding wireless telegraph stations to charge equal rates in both directions. This was substantially the arrangement between the Tuckerton and Eilvese stations. The toll rate charged for commercial messages sent from Tuckerton to Germany during the accounting period was 50 cents per paid word, which included the cost of local wire telegraph delivery to the addressee.

20. The gross tolls collected by the Navy in connection with the commercial operation of the Tuckerton Station during the accounting period were as much as $600,321.42. From this gross amount direct expenses of maintenance paid by Emil Mayer, as agent for Homage, and repaid to him by the Navy Department upon monthly certificates submitted by Mayer, amounted to $137,036.52.

On October 19, 1915, the Secretary of the Navy paid to the owners of Eilvese, the corresponding station with which Tuckerton carried on a commercial toll radio telegraph communication service, the sum of $35,237.61. And on June 10, 1919, the Secretary of the Navy paid $28,560.15 to the Alien

Property Custodian, as Trustee for Homag, as a share of the tolls collected at Tuckerton by the Navy and due the German station, leaving net tolls amounting to $399,487.14 after all payments. This latter amount was paid by the Navy Department to attorneys for a French corporation, Compagnie Universelle de Telegraphie et de Telephonie Sans Fil, for whom Homag had contracted to construct the Eilvese and Tuckerton stations.

21. Substantially all of the amount of approximately $600,321.42, which was collected as gross tolls by the Navy Department in the United States, originated in the transmission of 1,270,471 paid words from Tuckerton to Eilvese at 50 cents per word.

There is no evidence as to any amounts actually collected in the United States for messages transmitted from Eilvese and received at Tuckerton.

22. Two forms of continuous wave transmitters were used at Tuckerton during the accounting period to transmit to Eilvese.

The patents in suit disclose nothing novel and expressed no monopoly with respect to the production of or emanation of continuous waves from a transmitting station. They do not relate to either the construction or method of operation of a continuous wave transmitting station.

The patents in suit relate to and cover the heterodyne beat note method of reception and apparatus therefor, whereby a radio receiver is rendered more sensitive and can receive a signal transmitted by continuous waves over greater distances with greater selectivity and reliability as compared to prior art receivers such as the tone wheel.

Just and reasonable compensation for the use of plaintiffs' inventions is properly based upon the receiving apparatus installed and used at the Tuckerton Station by the Navy Department during the accounting period.

23. There is no evidence as to the number of receiving sets used at Tuckerton during the accounting period.

In order to maintain a twenty-four hour reception a reasonable and careful traffic superintendent would maintain three receivers in service, each of which would be in use during a

portion of the twenty-four hour period. He would also have available for cleaning, repair, and adjustment purposes three spare substitute receivers.

The cost of the six receivers would approximate $500 each, or a total of $3,000.

24. In the companion case, (C–26), involving the same plaintiffs and based on the same patents in suit, there are included in the accounting navy receivers contracted for as early as November 18, 1913. More specifically, this was the type I–P–76 receiver. This type of receiver was the most popular and best known receiver in the naval service and there were several hundred of these in service in the middle of 1914, when the ultra-audion and beat method of reception came into use. These receivers are set forth in the companion case in group "G" of the tabulations, Item 89.

25. Both prior to and during the accounting period plaintiffs refused to license others to manufacture or use apparatus under the patents in suit and refused to sell heterodyne apparatus that might go into commercial communication service, and there was no established royalty.

26. A fair and reasonable royalty for the use of the defendant's receiving sets for utilizing the inventions of the patents in suit is 18 percent of the cost of the sets where the receivers were used entirely for heterodyne reception. The receivers installed at Tuckerton were so used.

27. A reasonable and entire compensation for the use of the Fessenden inventions in suit is 18 percent of the sum of $3,000, or the sum of $540 plus an amount measured by interest at 5 percent per annum, not as interest but as a part of the entire or just compensation, on $540 from the beginning of the accounting period, September 9, 1914, to date of payment of the judgment.

28. Plaintiffs did not delay unreasonably in the circumstances in taking the proof in this and its companion case, No. C–26, which cases were tried together.

The court decided that the plaintiff, the International Devices Company, was entitled to recover $540 plus an amount measured by interest at 5 percent per annum, not

as interest but as a part of the entire or just compensation, from September 9, 1914, to date of payment of the judgment.

LITTLETON, *Judge*, delivered the opinion of the court:

The inventions covered by the patents in suit and used by the defendant during the accounting period from September 9, 1914, to April 6, 1917, while it controlled and operated the wireless telegraph station at Tuckerton, New Jersey, are explained and described in the findings herein, particularly findings 7 to 13, inclusive, and finding 10 of the findings and opinion promulgated March 13, 1933, 77 C. C. 87. The heterodyne patents in suit were basic or pioneer in character, and the inventions covered therein have been of great value in the radio art.

The parties differ widely as to the amount of reasonable and entire compensation which should be allowed for the use by the defendant during the accounting period of the heterodyne patents in suit. The defendant contends that a royalty of 10% of the cost of heterodyne receivers used, or a principal sum of $300, should be allowed. Plaintiffs ask for $90,721.41 plus a reasonable rate of interest as a part of the entire compensation to be allowed under the act of June 25, 1910, arrived at on the basis of 6 cents per paid word received by the wireless telegraph station at Tuckerton during the accounting period and 3 cents per paid word sent from that station. See findings 19–21. During the period of commercial operation under the supervision of the Navy Department of the United States, the Tuckerton Station received from Eilvese, Germany, 876,788 paid words and transmitted to Eilvese 1,270,471 paid words. The toll rate charged for commercial messages sent from Tuckerton to Germany during the accounting period was fifty cents per paid word, which included the cost of local-wire telegraph delivery to the addressee. The international custom during the period 1914 to 1917 was for corresponding wireless telegraph stations to charge equal rates in both directions. The United States did not operate the Tuckerton Station for profit and the United States did not receive any of the income or profits derived from operation thereof. See finding

17 herein and finding 16 of the original findings of March 13, 1933, (77 C. C. 87). The expense of the Navy personnel in charge of control and operation of the station appears to have been borne by the United States without reimbursement, which expense amounted to about $40,000 a year.

Upon consideration of the entire evidence submitted by the parties, we are of opinion that the amount of compensation claimed by plaintiffs, and the basis thereof, cannot be allowed and that, in the circumstances, a proper measure of the reasonable and entire compensation to which the owner of the patents is entitled is a reasonable royalty based on the cost to the government of the radio receivers embodying the heterodyne inventions covered by the patents in suit. See finding 22.

In a companion case, *National Electric Signaling Company, et al.*, C–26, *ante*, p. 621, and relating to reasonable compensation for the same patents as are herein involved, we have found a reasonable royalty to be 18 percent of the cost of receivers when the same are *exclusively* used for heterodyne reception. Having established this measure of compensation, it is properly applicable to all of defendant's receivers thus used, and we accordingly find that a fair and reasonable royalty for the use by the defendant of a minimum of six receiving sets at the Tuckerton, New Jersey, station for utilizing the inventions of the patents in suit is 18 percent of the cost of the sets where the receivers were used entirely for heterodyne reception, as was the case at the Tuckerton Station. The cost of the six receivers was $500 each, or a total of $3,000. See findings 26 and 27.

Judgment will therefore be entered in favor of the International Devices Company for $540, together with an additional amount measured by a reasonable rate of interest at 5 percent per annum, not as interest but as a part of the entire or just compensation from September 9, 1914, until paid. It is so ordered.

MADDEN, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

MAGOBA CONSTRUCTION CO., INC., A CORPORATION, v. THE UNITED STATES

[No. 42641. Decided June 7, 1943. Plaintiff's motion for new trial overruled October 4, 1943.]

On the Proofs

Government contract; changes; delay; damages.—It is *held* that the proof submitted does not establish that the defendant breached any provision of the contract in suit by unreasonably interfering with or delaying the proper prosecution and performance of the original contract work, including the changes ordered; and, further, that the proof does not establish that any of the changes ordered were unreasonable as not being within the contemplation of the contract, or that the defendant, in the circumstances, unreasonably delayed the proper prosecution of the original contract work in making a decision with reference to any of the changes considered or ordered by the defendant.

Same; breach.—The Government cannot be held liable in damages for delay in completion of the original work called for by a construction contract, unless the Government abused its privilege to make changes or otherwise unreasonably delayed the prosecution of the work in such a way and under such circumstances as to constitute a breach of some express or implied provision of the contract.

The Reporter's statement of the case:

Mr. L. M. Denit for the plaintiff. *Brandenburg & Brandenburg* were on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Elihu Schott* was on the brief.

Plaintiff seeks to recover $57,236.83 as damages for an alleged net delay of 244 days claimed to have been caused by the defendant in the completion of the contract for the construction of a post office and courthouse building at Brooklyn, New York. The amount claimed is made up of $20,715.60, alleged additional overhead expense at the rate of $84.90 a day; $1,483.27, additional property liability and fire-insurance premiums; and $35,037.96, additional ex-

pense alleged to have been incurred in performing the contract work and the loss sustained on account of impaired efficiency of labor.

The contract was completed 96 days after the original date specified therein.

The defendant contends that it did not unreasonably delay plaintiff in the proper prosecution of the work called for by the contract; that whatever delay was caused by the defendant in performance of the original work, called for by the contract, resulted from additional work and changes ordered and made by the contracting officer under and in accordance with the terms of the contract, which additional work and changes were duly paid for in accordance with agreements between the parties at the time.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. June 19, 1930, plaintiff, a New York corporation, entered into a contract with the defendant whereby plaintiff agreed to furnish all labor and materials and to perform all work required for the extension and remodeling, complete (except elevators, lifts, and pneumatic tube system), of the building of and approaches to, exclusive of the work specified as not included, the Post Office, Court House, etc., Brooklyn, N. Y., for the consideration of $2,050,000, in accordance with designated specifications, schedules, and drawings.

The work was to be completed within 720 calendar days after the date of receipt of notice to proceed. Notice to proceed was received by the plaintiff June 28, 1930, thus fixing the date for completion June 17, 1932.

The United States was represented in the contract by Ferry K. Heath, Assistant Secretary of the Treasury, as contracting officer.

During the construction of the project here in controversy, plaintiff encountered financial difficulties and on January 15, 1931, made an assignment for the benefit of creditors. April 27, 1931, plaintiff executed a power of attorney authorizing its surety, the United States Fidelity and Guaranty Company, to receive progress payments and to disburse the same.

During the course of construction, plaintiff's surety participated in the prosecution of the project work. Plaintiff has not engaged in any business activities since 1933 or 1934.

Article 18 of the contract read:

> *Definitions.*—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.
>
> (b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 44 of the contract specifications made the Supervising Architect the duly authorized representative of the contracting officer. The Supervising Architect is hereinafter referred to as "architect."

Copies of the contract and specifications, and the performance bond are filed in evidence and are made a part hereof by reference thereto.

The surety on plaintiff's bond for faithful performance was United States Fidelity & Guaranty Company, of the State of Maryland.

2. Various orders for changes in the work were issued by the defendant from time to time.

September 3, 1931, the contracting officer issued a change order increasing the contract price by $9,650.96 for changes in transom of first floor and on C. O. D. hold-over cage, relocating and enlarging of checking office on loading platform, snow-guards, etc., and increasing the time for completion of the contract seven calendar days. This was the only change order containing a provision for an extension of time for performance. During the prosecution of the work the effect of some of the changes ordered, as causing delay, was called to the attention of defendant's construction engineer, who suggested to plaintiff that they be not handled piecemeal as each change occurred but that all items of delay be included in one request and submitted before final completion of the contract. This the plaintiff did with the acquiescence of the contracting officer.

August 25, 1932, the plaintiff filed with the architect the following application:

We are asking for an extension on the contract time at the above building, due to various changes, extras and delays. Enumerated below you will find the item number, date proposal submitted by us, date of final acceptance by you, the nature of the work, the time consumed, and the number of days delay that we are asking:

1. Proposal submitted on Aug. 1st, 1930, Accepted Aug. 8th, 1930. For the installation of Two (2) manholes in street. Working days for its completion Twenty-one (21) days.

Delay asked ---------------------------- 2 days.

2. Proposal submitted Sept. 16th, 1930, Accepted Oct. 1st, 1930. For concrete work and angle iron curb in driveway. Drawing #225. Working days for its installation Nine (9) days.

Delay asked ------------------------------ 1 day.

3. Proposal submitted Sept. 16th, 1930, Accepted Nov. 18th, 1930. For additional conduit and wiring for electric clock system. This work done thru the entire length of the job.

Delay asked ------------------------------ 5 days.

4. Proposal submitted Jan. 7th, 1931, Accepted Jan. 26th, 1931. Steel shop Drawings previously approved changed by your directions of Sept. 6th, and Oct. 17th. These changes caused refabrication of steel for certain sections. Steel, consequently delayed at delivery.

Delay asked ------------------------------ 6 days.

5. Proposal submitted Mar. 17th, 1931, Accepted Apr. 1st, 1931. Changes in Terra Cotta and Granite Exterior due to variations in levels between new and old buildings, not shown on plans. On Dec. 29th, 1930, because of this variation in levels, work was stopped by the Construction Engineer. On Jan. 21st, we were advised to proceed with granite erection on the Washington Street front and to defer action on Adams Street until further notice. Plan #227 received in February showed changes to be made on Adams Street front. During this period work proceeded as far as possible, but no work done at that portion of Adams Street for connecting new and old building. After acceptance, due to time

involved in obtaining new granite and terra cotta, work was not begun at the junction point until July 1931.

Delay asked............................ 30 days.

6. Proposal submitted Mar. 24th, 1931, Accepted July 22nd, 1931. Changes in workroom of Old Building shown on Drawing #226.

Delay asked............................ 7 days.

7. Proposal submitted July 14th, 1931, Accepted cost plus basis on Nov. 11th, 1931. Changes in Vault, Medical Unit, Dr. #314, etc., Due to long delay in acceptance many branches of work tied up on fourth (4th) floor.

Delay asked............................ 22 days.

8. Proposal submitted Aug. 11th, 1931, Accepted Sept. 3rd, 1931. Changes in C. O. D. Dept. Loading platform, snow guards, etc.

Time given............................ 7 days.

9. Proposal submitted July 20th, 1931, Accepted on cost plus basis Sept. 5th, 1931. Additions to conveyors and extension of second floor mezzanine as shown on Drawing MH 484.

Delay asked............................ 20 days.

10. Initial proposal submitted Sept. 23rd, 1931, Accepted on Oct. 30th, 1931, Construction of penthouse, cafeteria, etc., Drawings #232 and #233. On May 12th, 1931, we were ordered to stop work on the roof of the Washington Street wing, pending certain changes. Drawings 232, 233 showing these changes were not received until Sept. 1st, 1931. Our original proposal submitted Sept. 23rd, was rejected. We were then asked to submit a proposal on only one phase of the proposed changes. This matter was not settled until Oct. 30th, 1931, or nearly six (6) months after the stop order was given to hold up work on Washington Street wing. Consequently, the plastering, trim, floor, terrazzo, marble, etc., was held up on the 6th and 7th floors of the Washington Street wing during this period and our entire schedule of operations badly disrupted.

Delay asked............................ 90 days.

11. Proposal submitted Aug. 10th, 1931, Accepted Oct. 2nd, 1931. For changes and additions to mechanical work 2nd Floor Mezzanine shown on Drawing CW 485 Twenty working days for installation.

Delay asked............................ 7 days.

12. Proposal submitted Nov. 4th, 1931, Accepted Nov. 14th, 1931. For changes to Telephone Room 4th and 5th fl. shown on Drawing #237. Ten (10) working days for installation.

Delay asked________________________________ 2 days.

13. Proposal submitted Dec. 14th, 1931, Accepted Jan. 8th, 1932. For covering conveyors. Thirty (30) days for drawing plans and erection.

Delay asked________________________________ 3 days.

14. Proposal submitted Feb. 16th, 1932. Accepted Feb. 26, 1932. New Electrical work in Basement 1st, 3rd, and Attic Floors. All work in these places finished. Fifteen (15) days for installation.

Delay asked________________________________ 3 days.

15. Proposal submitted Feb. 16th, 1932, Accepted Feb. 24th, 1932. Conveyor changes in erected and finished equipment requested by Postmaster. At this time the New Building was being prepared to be turned over to the Post Office Department. Working days required to make this alteration Ten (10) days.

Delay asked________________________________ 3 days.

16. Proposal submitted Dec. 18th, 1931, Accepted Mar. 16th, 1932. For additional electrical outlets on 2nd Floor Mezzanine. Six (6) working days for installation.

Delay asked________________________________ 1 day.

17. Proposal submitted Feb. 29th, 1932, Accepted Mar. 18th, 1932. For changes in basement, shown on plan #237. Plans and time of erection 30 days.

Delay asked________________________________ 1 day.

18. Proposal submitted Mar. 10th, 1932, Accepted April 8th, 1932. Millwork on Sixth (6th) floor. Floor occupied. To draw plans and erect work 25 days.

Delay asked________________________________ 1 day.

19. Proposal submitted Mar. 16th, 1932, Accepted on Mar. 30th, 1932. Toilets for detention cells shown on drawing #241. Work held up pending approval of proposal. Fourteen working days for the erection.

Delay asked________________________________ 5 days.

20. Initial proposal submitted Apr. 22nd, 1932, Accepted May 25th, 1932. Electrical work on first floor of working room—old building. Entirely new work, not connected with old work and work had to be done

in quarters finished and occupied by the Post Office Department. Time of erection—sixty working days.

Delay asked................................ 2 days.

21. Strike over which we had no control from May 1st, 1932 to June 13th, 1932, tied up all operations and caused an unavoidable delay.

Delay asked................................ 44 days.

We believe the above statement of 262 days' delay to be a reasonable and conservative estimate of the time lost from the various causes as stated and we wish to call to your attention that the new building was turned over for occupancy considerably in advance of your anticipated date.

Upon this application of plaintiff the contracting officer granted plaintiff an additional extension of time of 155 days in a letter of September 26, 1932, as follows:

In connection with your contract for the extension and remodeling of the Post Office in Brooklyn, New York, reference is made to your letter of August 25, 1932, requesting that consideration be given to two hundred and sixty-two days' delay caused you by changes in the work.

In connection with your contract, it may be stated that the Construction Engineer, at a conference in this office, advised that there had been considerable delay caused by the Government, in connection with changes in the work but which he had not taken up with this office, as he thought it might be possible to complete the work within time, in spite of the many changes made as the work progressed. For this reason, the delays were not taken up at the time they occurred and consideration will be given, in the order named, to the twenty-one items set forth in your letter of August 25.

With regard to Items numbers 1, 2, 3, and 4, as no material delay resulted from these changes and work was progressing at the time, it is not felt that additional time is due you therefor.

With reference to Item 5, you asked for consideration of thirty additional days, on account of the changes in terra cotta and granite exterior, due to variations in levels between old and new buildings, which were not shown on the plans. Our records show that on December 29, 1930, the Engineer advised that he had suspended all work of setting stone on the Washington and Adams

Street fronts, due to the variations in level. You were allowed to proceed with the Washington Street front on January 21, 1931, but it was necessary to prepare a drawing for changes to be made in the Adams Street front. It was not until April 1, 1931, that your proposal was accepted for the changes in the Adams Street front, and you state as new granite and terra cotta had to be obtained, you could not begin work on this change until July 1931. On account of the long delay caused by the change in the Adams Street front, it is considered that the thirty days requested by you are fair.

It will not be necessary to take up Items 6, 7, and 9, as the delay mentioned by you ran concurrently with that under Item 10. You have already been given the seven days named under Item No. 8.

Considerable delay was caused you in connection with the construction of penthouse, cafeteria, etc., named under Item #10. You were directed on May 12, 1931, to hold up work on the roof of the Washington Street wing, pending contemplated changes. The drawings for these changes were not sent you until September 1, 1931, and your revised proposal was accepted on October 30, 1931. Inasmuch as work on the sixth and seventh floors and roof construction was held up during the period from May through October, while the contemplated changes were in abeyance, it is considered that you were delayed fully one hundred and twenty-five days in the prosecution of the work.

On account of the considerable number of additional days due you under Items numbers 5 and 10, it is not felt necessary to take up the small delays mentioned in Items 11 to 20, inclusive, especially as work was being carried on constantly at the same time as the work being performed on these items.

It is not felt necessary to take up the question of the strike mentioned in Item No. 21, inasmuch as the additional days taken into consideration under Items 5 and 10 will cover the time which you were delayed in the completion of your contract on account of conditions beyond your control and for which you were not at fault.

Summing up the delays caused by the conditions set forth in Items 5 and 10, it is considered that you are entitled to a total of one hundred and fifty-five (155) additional days, i. e., thirty days under Item 5 and one hundred and twenty-five days under Item 10, due note of which will be made at time of final settlement.

The total extensions of time granted by the contracting officer amounted to 162 calendar days. This extension of 162 days carried the completion date to November 26, 1932. The contract work was completed and accepted September 21, 1932.

3. The facts as established by the evidence of record with reference to the various items, 21 in number, set forth in the plaintiff's application to the architect for extension of time, August 25, 1932 (finding 2), are set forth below with corresponding serial numbers.

4. (1) *Manholes.*—The city authorities required two manholes to be constructed at sewer connections in the street. For this work plaintiff submitted to the architect a proposal August 1, 1930, in the amount of $1,512.54, including overhead and profit, which was accepted August 8, 1930. Acceptance of the proposal was stated to be without further modification of the contract terms. No extension of time was mentioned by either party and the proof does not show that the work required or the negotiations therefor resulted in delay in completion of the contract.

5. (2) *Driveways.*—By change order of October 1, 1930, the contracting officer accepted a proposal by plaintiff for additional concrete work and angle iron curb bar, to form a step along driveway at north wall in connection with old footings, at $1,485. Acceptance was stated by defendant to be without further modification of the contract terms. Neither proposal nor acceptance included extension of time for performance. There is no proof that by this change or the negotiations therefor the contract completion date was delayed.

6. (3) *Electric clock system.*—The architect asked plaintiff for a proposal for additional outlets for electric clocks not included in the original contract. Plaintiff submitted a proposal of $4,021.43, which the architect rejected as excessive, and on November 18, 1930, the architect gave plaintiff an order to proceed with the work on a cost basis, plus 10% overhead and 10% profit, not exceeding $4,021.43. The order required an itemization of the cost and the number of days of delay caused by the extra work. This order was

withdrawn by the architect December 11, 1930, and plaintiff was asked for a new proposal covering different details. No new proposal is in evidence. February 29, 1932, plaintiff furnished the architect with a statement showing the actual cost of the work according to drawings "as revised August 20, 1930" plus overhead and profit, to be $4,010.31. May 12, 1932, the contracting officer advised plaintiff by letter that the sum of $4,010.31 was approved and called attention to the fact that plaintiff had requested no additional time. No additional time was allowed.

The proof does not show that this change in work retarded final completion of the contract, or that such retardation resulted from negotiations for the change.

7. (4) *Refabrication of steel columns.*—August 19, 1930, plaintiff's subcontractor for structural steel took up with the architect directly by letter the matter of unexplained changes in sizes being made on the original plans, the original plans having been approved previously, July 14, 1930. Again on August 22, 1930, the subcontractor communicated by letter directly to the architect criticizing the measurements of beams between columns. August 30, 1930, the architect returned directly to the subcontractor the shop drawings for certain steel columns with his corrections, sending one set to the plaintiff. September 2, 1930, the subconcontractor wrote to the architect stating that changes made by the architect increased sizes, whereas fabrication had already proceeded on the original design. Other correspondence followed. September 9, 1930, plaintiff notified its subcontractor that it would not be responsible for any extra cost occasioned by changes that were not handled through its own office and sent a copy of this notice to the architect's representative at the site. October 24, 1930, the subcontractor by letter advised the architect that the changes involved extra charges against the government, which would be handled through the plaintiff.

November 26, 1930, plaintiff transmitted letters to the architect, for checking, from the subcontractor of November 21, 1930, requesting extra compensation of $1,011. Plaintiff more formally claimed this amount January 7, 1931, adding

$100 for overhead, nothing for profit. No claim was made for extension of contract time. January 26, 1931, the contracting officer acknowledged and accepted the charge of $1,111 as properly payable to the plaintiff. The proof does not show that this charge has not been adjusted by payment. The acceptance by the contracting officer stated that it was without further modification of the contract terms. No extension of contract-time was made. There is no satisfactory proof that these changes or the negotiations in connection therewith resulted in delay in completion of the contract.

8. (5) *Difference in water tables.*—The addition to the Brooklyn post-office building was to the north of the existing structure. The old and new buildings together were bounded on the north by Tillary Street, on the east by Adams Street, on the south by Jackson Street, and on the west by Washington Street.

After the work had been started by plaintiff, defendant's construction engineer discovered about December 29, 1930, that there was a difference in the water table levels between the northeast and northwest corners of the old building. The defendant was not theretofore aware of this difference and it was not shown on the contract plans. Actual construction of the addition revealed it. It was first observed by defendant's construction engineer incidentally on December 29, 1930, and he immediately ordered the setting of granite stopped. He forwarded a diagram to the architect December 31, 1930, showing the variation. The problem of taking care of the difference between the levels, because of the fact that the water table of the addition connected the two varying water table levels of the old building, was one difficult of immediate solution, and could not be solved until designs had been drawn and approved by defendant. Care, had to be taken in the drawing of designs so as not to make the joint unsightly.

The plaintiff stopped the setting of granite as ordered. January 21, 1931, the construction engineer ordered plaintiff to proceed, describing the method to be pursued as approved by the contracting officer, until the junction between the new

and old buildings was reached on Adams Street, when further instructions would be issued. The order to resume work concluded with the statement: "In the final report on this work the time you have lost will be allowed as an extension if found necessary to do so."

The difficulty encountered in connection with the levels of the water tables was readily overcome by the insertion of two small strips of square-cut stone at the junction of the two buildings. The drawing depicting the treatment of granite and terra cotta at the junction on Adams Street was given to plaintiff February 13, 1931, and plaintiff was asked for a proposal for the extra costs. Plaintiff's proposal of $1,336 was furnished March 6, 1931, and after consideration it was accepted by the contracting officer April 1, 1931. In the meantime plaintiff had been proceeding with the granite work since January 21, 1931, as above stated. The proposal and acceptance did not include any request or allowance of extra time for performance. The acceptance stated that it was without further modification of the terms of the original contract. The stoppage of the work of setting granite when the difficulty was first discovered resulted in some delay in completion of the original contract. Plaintiff was fully compensated for the time incident to the additional work. Whatever delay resulted in the performance of the original contract was not the fault of the defendant, but was due to the failure of plaintiff to conform to the requirements of paragraph 31 of the specifications. This paragraph provided as follows:

> *Measurements.*—All dimensions shown of existing work, including work placed under a former contract for foundation work, etc., and all dimensions required for work that is to connect with work now in place, shall be verified by the contractor by actual measurement of the existing work. Any discrepancies between the drawing and specifications and the existing conditions shall be referred to the Supervising Architect for adjustment before any work affected thereby has been performed.

When certain granite shop drawings were submitted by plaintiff early in August 1930, without having verified

dimensions by actual measurements, such drawings were conditionally approved by the defendant and the following notification sent to the plaintiff:

> Contractor's drawings Nos. 4–5 and 6 (no letter recd.) and given office Nos. 631, 632, 635, approved for jointing only, subject to corrections noted thereon in red, specification requirements regarding fitting, measurements, etc.

Specification requirements regarding fitting, measurements, etc., as set forth in the above-quoted approval, relate to paragraph 3 of the specifications. Plaintiff did not at any time prior to December 1930 have a surveyor on the site, nor did plaintiff check any elevations or measurements whatsoever. Had this been done, the correct water table levels would have been known and corrected long prior to December 29, 1930, when plaintiff reached that point in the work, when the difficulty was first discovered. Moreover, the performance of granite work was concurrently delayed because of failure of the granite subcontractor to secure prompt delivery of materials.

9. (6) *Workroom changes.*—December 29, 1930, the construction engineer requested of plaintiff a bid for changes in switchboard room, lobby screen, and workroom at the first floor, according to plans forwarded with the request.

March 17, 1931, plaintiff offered to make these changes for $11,071, including overhead and profit. This proposal was not conditioned upon extra time for performance. April 4, 1931, the architect objected to the bid submitted because it was excessive, and requested a revised proposal. Plaintiff reduced the proposal May 7, 1931, to $9,861, also including overhead and profit. The proposal as reduced was accepted by the contracting officer July 22, 1931, without any allowance of additional time for performance. Acceptance of the proposal was stated by the contracting officer to be without further modification of the contract terms. Completion of the original contract work was not delayed by consideration or execution of changes in the workroom.

10. (7) *Changes in vault, medical unit, and door.*—March 16, 1931, the construction engineer requested of the plaintiff a proposal for described changes in a vault, medical

unit, and door. Plaintiff delayed until July 14 before submitting a proposal. This proposal was rejected, and on July 31, 1931, plaintiff was requested to submit a new proposal. The second proposal was not submitted until August 18, 1931, and after negotiations another proposal was submitted October 26, 1931, which was accepted by the defendant November 11, 1931. The work covered by this change order was thereafter performed by plaintiff's subcontractors at intermittent intervals from November 1931, until March 4, 1932.

The proof does not show that defendant caused any unreasonable delay in connection with this item or that any delay with respect thereto delayed the completion of the contract. If any delay occurred, it ran concurrently with that considered in finding 14.

11. (8) *Changes in C. O. D. department.*—July 23, 1931, the architect requested of plaintiff a proposal for designated changes in transoms of first floor, changes in C. O. D. holdover cage, and in checking office on loading platform, snowguards over skylights, etc.

Plaintiff furnished a proposal August 10, 1931, for $9,650.96, including overhead and profit, with seven calendar days extension of time for completion of the contract. The proposal was accepted September 3, 1931.

There is no proof that this transaction resulted in delay beyond the seven days additional time agreed upon for performing the change.

12. (9) *Additions to conveyors.*—July 6, 1931, the construction engineer requested of plaintiff a proposal for changes in the conveyor system, adding some conveyors and omitting others. Plaintiff furnished the proposal to the architect July 20, 1931, in the net sum of $31,221, including overhead and profit. The architect objected to this August 1, 1931, as excessive and asked for a revised proposal. The plaintiff furnished a revised proposal August 17, 1931, in the amount of $32,609.50, including overhead and profit, and asked for immediate attention in order not to delay progress.

September 5, 1931, the construction engineer, with the architect's approval, authorized plaintiff to proceed with

the change on a cost basis, plus profit and overhead, in all not to exceed $32,609.50. The authorization stated that it was without further modification of the contract terms. No extension of time for performance was mentioned by either party. After conclusion of the work plaintiff furnished the architect an itemized statement of the cost May 27, 1932, concluding: "In a separate letter being forwarded directly we are putting in our claim for the number of days delay and the reasons thereof."

Performance of the additional work and the time involved in this change, for which plaintiff was compensated, delayed the completion of the original contract. There is no proof of delay in connection with this change for other reasons.

13. (10) *Penthouse and cafeteria.*—May 12, 1931, the architect issued the following order to plaintiff:

> Referring to your contract for the extension, etc., of the Post Office Building, Brooklyn, N. Y., you are directed to hold up work on the roof south of Column #4 as the roof insulation and extension of the elevator to the attic are contemplated.

This order arose from plans that were under consideration and being made by the defendant for a cafeteria on the seventh floor of the extension. This involved changes and extra work under the original contract.

The architect completed his plans for the cafeteria and other changes September 1, 1931, and on that date requested of plaintiff a proposal covering the contemplated addition.

Plaintiff submitted a proposal September 23, 1931, in the amount of $117,145.66, including overhead and profit, and on September 25, 1931, suggested to the architect plans to expedite the work, in view of delay which would be caused by the stop order of May 12, 1931.

October 12, 1931, plaintiff again addressed the architect complaining that the delay was increasing and in the future would operate to increase the cost of the work, notified the architect that compensation would be expected for losses incurred, and requested an extension of time for completion of the contract.

Along with the addition of a cafeteria there were other proposed changes which called for and required extension of elevator shaft, construction of a penthouse, skylights, machine room, change in stairs, and other incidentals. For this work plaintiff submitted a separate proposal October 22, 1931, for $13,600. The plaintiff stated this as the actual cost of construction of the changes—that is, it did not include any amount for loss due to delay, claim for which was reserved.

October 30, 1931, the architect rejected plaintiff's proposal of $117,145.66 for cafeteria, "on account of insufficient funds," and the same day the Secretary of the Treasury wrote plaintiff that "Your proposal dated October 22d, 1931, in amount, $13,600.00, is accepted, as an addition to your said contract and without further modification of its terms, for the construction of a penthouse, etc., as described, and in accordance with memorandum specification dated September 1, 1931, and drawings mentioned therein, to permit the installation of the cafeteria at a later date."

Plaintiff asserted claim for extra time for performance due to the stop order pending action and decision on the changes and orders attendant thereon, and on November 20, 1931, notified the architect that the delay was from May 14 to October 30, 1931 (being 169 days), and that the company would at the proper time present its claim for compensation for loss due to the delay.

The stop order of May 12 involved only a portion, about 50 x 50 ft., of the work on the Washington Street wing of the new building and therefore involved only a small portion of the entire contract work. At the time the stop order was issued, plaintiff had not reached the limited area affected by it and did not do so until August 3, 1931. During the period August, September, and October 1931, plaintiff, with approval by defendant, disregarded the stop order and proceeded with its work on the roof of the Washington Street wing of the building, south of Column 4, and throughout other portions of the building, as though no stop order was in existence.

Plaintiff's daily progress reports show that plaintiff and

its several subcontractors were employing throughout the building as many men engaged in productive work between May 1 and October 31 as had been employed prior to that time.

Progress on the entire section of the new building where it was to be tied into and become a part of the existing structure had lagged from the outset and was far behind normal. The lack of progress for this structure was due to the fault of the plaintiff and continued to exist, notwithstanding the repeated efforts of the defendant to obtain a more orderly and a more efficient method of operation.

The proof does not establish that defendant caused plaintiff any unreasonable delay in completion of the original contract by reason of the consideration and action taken in connection with the changes mentioned in this finding. The proof does not satisfactorily show the amount of costs and expenses, if any, incurred by plaintiff by reason of the consideration of and action on these changes in excess of the amount of $13,600 paid for the changes ordered and performed, which amount included overhead and profit to plaintiff and the subcontractors concerned.

14. (11) *Changes on mezzanine floor extension.*—July 28, 1931, the construction engineer requested of plaintiff a proposal for additional conduit and wire work, fixtures, changes in drinking fountain, and miscellaneous work, all in connection with an extension to the mezzanine floor. Plaintiff submitted a proposal for $4,164.82, August 10, 1931, including overhead and profit. The proposal was accepted October 2, 1931, after plaintiff had been asked for and had submitted, in the middle of September, an itemization of the cost of electrical work. Acceptance of the proposal stated that it was without further modification of the contract terms. No mention of extended time for performance was made in the proposal or the acceptance. Consideration of the change did not delay completion of the contract.

15. (12) *Changes in telephone rooms.*—October 24, 1931, the construction engineer requested of plaintiff a proposal for desired changes in telephone rooms on the fourth and fifth floors. November 4, 1931, plaintiff proposed to do this work for $1,835, including overhead and profit. The pro-

posal was accepted November 14, 1931. Acceptance of the proposal stated that it was without further modification of the contract terms. Neither party suggested any extension of time for performance due to this change in plans. There is no proof of delay attendant upon this change, or order for the same.

16. (13) *Covering escalator openings.*—December 14, 1931, plaintiff furnished the architect a requested proposal for covers for certain escalator openings. The proposed amount was $419.87, including overhead and profit. The proposal was accepted January 13, 1932. Acceptance was stated to be without further modification of the contract terms. No extension of time was requested or allowed, and there is no proof as to any effect on the time for completion of the contract.

17. (14) *Additional electrical work, basement, first, third, and attic floors.*—The architect decided upon a change involving certain additional electrical work in the basement, on the first and third floors, and in the attic. January 14, 1932, the plaintiff was asked for a proposal, which was made February 16, 1932, in the sum of $1,461, including overhead and profit. The proposal was accepted February 26, 1932. Acceptance was stated to be without further modification of the contract terms. The proof does not show that completion of the contract was delayed by reason of this additional work, or the circumstances surrounding the proposal and acceptance thereof. The parties made no mention of extension of time, either in the proposal or in acceptance thereof.

18. (15) *Changes in conveyors.*—In response to a request therefor the plaintiff furnished the architect on February 16, 1932, with an estimate of $935 for changes in designated conveyors. The construction engineer on February 24, 1932, requested plaintiff to proceed with the work at once pending approval of the proposal, and the same day the contracting officer accepted the proposal by wire. Acceptance was stated to be without further modification of the contract terms. The time for completion was not extended by the defendant's officers, nor was an extension requested in the estimate. The proof does not show that the change

or the negotiations therefor delayed completion of the contract.

19. (16) *Additional electrical outlets.*—February 11, 1932, the construction engineer requested of plaintiff an immediate proposal for additional electrical outlets on the second floor. Plaintiff furnished the proposal of $425 to the architect February 18, 1932, which was accepted March 16, 1932. Acceptance was stated to be without further modification of the contract terms. The proof does not show any delay on this item. No extension of time was requested or granted.

20. (17) *Changes in basement.*—January 13, 1932, the construction engineer requested of plaintiff a proposal for changes in wire screen work in the post office storage room in the basement of the old building. This proposal was furnished the architect February 29, 1932, in the sum of $907, including overhead and profit. It was accepted March 18, 1932, without extension of time being asked for or granted. Acceptance was stated to be without further modification of the contract terms. The proof does not show any delay in connection with these changes.

21. (18) *Sliding doors for counters.*—February 19, 1932, the construction engineer requested of plaintiff a proposal for sliding doors for counters. The proposal of $750 was furnished the architect March 10, 1932, and was accepted April 8, 1932. Acceptance was stated to be without further modification of the contract terms. No extension of time was stipulated or granted, and there is no adequate proof of delay on this item.

22. (19) *Toilets in detention pens.*—March 7, 1932, the construction engineer requested of plaintiff a proposal for toilet rooms in detention pens on the third floor. This proposal of $1,255 was given the architect March 16, 1932, and was accepted March 30, 1932. Acceptance was stated to be without further modification of the contract terms. No extension of time was stipulated or granted. By reason of the additional work, final completion of the contract was delayed. The proof does not show delay for other reasons on this item of the claim.

23. (20) *Electrical work, first floor, working room.*—April 18, 1932, the construction engineer requested of plaintiff a proposal for the installation of additional electrical conduit and wire work on the ceiling of the old work-room area, the proposal to cover all plastering, patching, cutting, etc., necessary repairs, and new panel boards. The construction engineer asked for expedition. May 6, 1932, the plaintiff bid $1,675. This proposal was accepted by telegram May 25, 1932. Acceptance was stated to be without further modification of the contract terms. The plaintiff made no stipulation as to extension of the contract time for performance and the acceptance of the proposal granted no extension of time. The evidence does not show that the change or circumstances surrounding it involved delay in completion of the contract.

24. (21) *Strike.*—In the spring of 1932 plaintiff met with a strike on the work and notified the architect on May 25, 1932, that the strike was in force and was delaying completion of the building. The architect on June 7, 1932, acknowledged receipt of this notice. June 21, 1932, plaintiff wrote the architect as follows:

> We refer to our letter of May 25th, 1932, in which we notified you of a stop in the progress of our work at the above building, since May 1st, due to a wage dispute. This wage dispute has now reached the stage of settlement whereby we were able to proceed with our work on June 13, 1932. We therefore ask you to extend the time of our completion by Forty-four (44) calendar days.

The strike had the effect of delaying completion of the contract approximately 44 days. The government was in no way responsible for the strike or the delay caused thereby.

25. (a) *Approval of elastic pointing.*—Article 75 of the contract specifications provided for submission to the architect of enumerated samples for laboratory test, stating: "The following samples subject to laboratory tests (if not conditionally approved), shall be submitted to the Supervising Architect with the names of the manufacturers and brands. The minimum time required for making tests is

generally 10 days after the receipt of the sample. The quantities stated are the least that can be considered."

Among the samples so enumerated was an elastic pointing compound for masonry. Plaintiff delayed, without excuse, almost a year before it submitted a sample of the elastic compound. It was about ready to do the contract work involving its use before the sample was submitted. The specifications did not limit the time for test and acceptance of samples to 10 days. A sample of this compound was submitted to the architect by the plaintiff June 15, 1931, and was rejected by the architect August 13, 1931, after examination and test, on the ground that it leaked before strain was applied and that it stained badly. Other samples were submitted August 19, 1931. Beginning September 2, 1931, plaintiff urged the architect to expedite passing upon the sample and indicated that the failure of the architect to act was threatening to interfere with other work on the contract. After examination and tests one of the samples submitted was found to be satisfactory, whereupon the contracting officer on October 8, 1931, wired plaintiff his approval of the sample submitted August 19. The contracting officer did not delay unreasonably in testing and deciding upon acceptance or rejection of the samples submitted June 15 and August 19, 1931. Plaintiff delayed unreasonably in submitting samples of elastic pointing compound. Had plaintiff submitted the sample of elastic pointing compound for masonry within a reasonable time after the contract was executed, no delay whatever in performance of the contract work involving the use of the elastic pointing compound would have occurred.

The work of cleaning and pointing the masonry was commenced October 13 and was finished December 31, 1931. Swinging scaffolds were used for this work. They were put in place about August 5, 1931, and remained idle for about nine weeks, during which period the rental was $540. The labor cost of performing the work of cleaning and pointing the masonry during the cold weather between October 13 and December 31, 1931, was $2,410 more than such cost would have been had plaintiff submitted the sample within a reasonable time so that it could have been tested and ac-

cepted, and the work, involving its use, performed during warm weather.

26. *Plastering.*—August 2, 1930, plaintiff entered into a contract with Joseph A. Cuddihy, Inc., whereby the subcontractor was to furnish all the necessary labor and materials to complete all the lathing and hanging ceilings, plastering and ornamental plastering for the Brooklyn Post Office Building, including patching, all to the satisfaction of the United States Government. The subcontract was subject to the government contract and provided for additions or omissions of work. There were numerous additions to the work agreed upon by the plaintiff and this subcontractor from time to time.

The subcontractor, in his plans for the work, calculated that it would take four months in which to complete its work, including delays due to lack of orderly sequence, and delay incident to removal from the old building to the new addition.

The work called for by the subcontract was commenced in May or June of 1931 and was completed in September or October of 1932. The subcontractor was delayed to some extent in its work due to changes by the defendant in connection with the penthouse and cafeteria on the seventh floor of the new addition—see finding 13.

The subcontractor complained to the plaintiff of the delay, and in June 1932 presented to the plaintiff a claim of $7,412.68 for overhead during 15 weeks which it asserted as the extent of time it was delayed or prevented from working.

On receipt and consideration of the claim plaintiff denied liability and refused any payment thereon on the ground that other payments made in the course of the contract work by plaintiff to the subcontractor had fully compensated the subcontractor for any delay, and no payment on the claim after its presentation has been made. There is no satisfactory proof either that plaintiff has paid the claim or any part of it, or that plaintiff is obligated to make such payment, and the subcontractor has taken no measures to collect or enforce any part of the claim.

27. *Roofing.*—July 18, 1930, plaintiff entered into a contract with A. Ratner & Company, which company undertook in consideration of $33,500 to furnish all the labor and materials to install complete all the slate roofing, sheet metal work composition, copper flashing and all membrane waterproofing for the Brooklyn Post Office Building, all work to be completed to the satisfaction of the United States Government.

In the prosecution of its work under this subcontract A. Ratner & Co. made a claim to plaintiff for delay occasioned by the defendant's stop order and changes in connection with the matters set forth in finding 13. Plaintiff and the subcontractor compromised the claim and plaintiff paid the subcontractor the compromised amount of $500.

The proof is not sufficient to show that defendant breached its contract with plaintiff in connection with the matters made the basis of the above-mentioned claim of the subcontractor against plaintiff.

28. *Structural steel work.*—June 25, 1930, plaintiff entered into a contract with Taylor-Fichter Steel Construction Co., Inc., whereby the latter agreed to furnish and erect the structural steel and ornamental, architectural, and miscellaneous ironwork for the building here involved for $204,000. This subcontract provided for additions and omissions and the Taylor-Fichter Steel Construction Co. was made the agent of the plaintiff for the purpose of the contract. The subcontract further provided:

> This contract is based upon continuous erection with the use of only 1 tier of plank on the basis that form work for arches will follow the steel work.

Article XI of the subcontract provided: "In the event of any difference or dispute between the parties hereto, the same shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen, the decision of any two of them shall be final and binding; and each of the parties shall pay one-half of the expenses of such reference."

A dispute arose between plaintiff and its subcontractor, the Taylor-Fichter Steel Construction Co., the steel con-

struction company claiming that it was damaged because of interference with its work by the plaintiff, destroying continuity of operations, plaintiff refusing to satisfy the claim. The dispute was submitted to arbitration August 29, 1932, by three arbitrators, the parties to the arbitration appearing as Taylor-Fichter Steel Construction Co. and United States Fidelity & Guaranty Co., surety on plaintiff's bond for performance (finding 3). The arbitration was had under arbitration laws of the State of New York and regulations pursuant thereto.

Award on the arbitration was handed down November 10, 1932, the findings of the arbitrators being as follows:

> That after consideration of the evidence presented with regard to the claims filed by Taylor-Fichter Co., Inc., as finally listed in a document presented at the second hearing (Nov. 2, 1932) and counterclaim of the U. S. Fidelity and Guaranty Co., Inc., listed in their brief of Oct. 18, 1932, page 8, insofar as these come within the terms of the submission, hereby award to the Taylor-Fichter Co., Inc., the amount of Seven Thousand Five Hundred and Sixty Dollars ($7,560) on these claims inclusive of interest to the date of this award. This award is exclusive of any balance claimed or due on the original contract on items not presented by common consent to this arbitration.

The claim and counterclaim referred to in the award are not in evidence in the instant case. The Taylor-Fichter Steel Construction Co. received payment from the bonding company on the award November 17, 1932, in the sum of $7,560.

The steel construction company was delayed to some extent by the stop order incident to the changes in plaintiff's contract referred to in finding 13. There is no proof of the amount of loss or damage sustained by plaintiff as a result of the delay, except its liability to the bonding company on the award of arbitration.

The proof does not establish that the amount awarded to the subcontractor was due to any breach by the defendant of its contract with plaintiff, or to any unreasonable or unauthorized act of the government under plaintiff's contract.

There is no proof to show what portion, if any, of the award of $7,560 was attributed to change orders of the defendant.

29. *Temporary heating.*—Article 88 of the contract specifications provided:

> Steam for heating the old building from the beginning of the heating season of 1931–1932, which starts about September 15, 1931, must be furnished by this contractor, and generated in the new boiler plant, which is to be installed in the subbasement.

Coal for the steam was to be furnished by the Government up to a designated amount. The plaintiff furnished heat for the building March 29 to April 29, 1932, both dates included. There is no evidence of heat furnished by plaintiff thereafter. The cost to plaintiff of furnishing heat for this period of 32 days was $1,792.

The furnishing of temporary heat by plaintiff to April 29, 1932, was not made necessary by any unreasonable delay caused by defendant in the performance of the original contract work, or by any unauthorized or unreasonable act or omission of the defendant under the contract.

The proof does not show that plaintiff based and computed its total bid price including overhead and profit on a completion date earlier than that of June 17, 1932, fixed by the contract. Plaintiff did not at any time advise defendant that it had planned or was prepared to complete the original contract work by January 1, 1942, or any other date thereafter, before June 17. Plaintiff did not furnish defendant with a progress schedule. Whatever delay occurred in the completion of the original contract work, other than such delay as necessarily resulted from consideration and ordering of authorized and reasonable changes and additional work for which plaintiff was fully compensated, was the fault of the plaintiff.

30. The 62 changes ordered and performed during the course of the work were authorized by articles 3 and 5 of the contract, and were normal in character and number for a structure of the kind and magnitude of this one. In every instance the changes and additional work ordered were made as a result of preliminary negotiations and vol-

untary agreement between the parties as to price and conditions. Approximately ninety percent of the structural and finishing work was performed by more than twenty independent subcontractors in the various trades who supplied the material and furnished the labor and technical supervision, the plaintiff retaining for itself only the masonry and some of the rough carpentry. Whenever changes or extras were requested, plaintiff sent the Government's drawing or specification, which showed in detail in each case the character of the change desired, to one of its subcontractors and obtained a bid from him to furnish all material, labor, supervision, tools, and equipment necessary to install the additional work. Upon receiving the subcontractor's bid, which included overhead and profit, plaintiff added twenty percent to the total price quoted, including overhead and profit to the subcontractor and to plaintiff, and then forwarded the combined figures to the government as its own proposal for performing the additional or changed work requested. The changes requested and agreed upon increased the original contract price by a net amount of more than $80,000. Plaintiff, therefore, without consuming any time other than that needed to obtain a bid from its subcontractor, realized a profit from the change orders alone of approximately $15,000.

Any loss of efficiency by workmen was a result of a faulty method of planning and procedure by plaintiff. Whatever financial loss may have resulted from lost efficiency of labor was borne for the most part by the subcontractors who were apprised of the conditions at the time of submitting their bids to plaintiff. No credible evidence has been submitted to establish the claim that any inefficiency of the workmen of plaintiff or those of its subcontractors was in anywise attributed to any unauthorized or unreasonable act or omission on the part of the defendant.

31. Plaintiff's overhead expense for the entire period of contract activity averaged $84.90 per calendar day.

32. Other items sued on in the petition are either abandoned by plaintiff, or the evidence concerning them is such as not to warrant findings of fact thereon.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The contract involved in this suit was entered into June 19, 1930, and under it plaintiff agreed to furnish all labor and materials and to perform all work required for the extension and remodeling of the building, exclusive of the work specified as not included, at the post office and courthouse at Brooklyn, New York, for a consideration of $2,050,000, in accordance with designated specifications, schedules, and drawings. The specifications upon which plaintiff submitted its bid and the contract subsequently entered into by the parties provided that the work called for by the specifications and drawings was to be completed and delivered within 720 calendar days after date of receipt of notice to proceed. Notification was received by plaintiff June 28, 1930, fixing June 17, 1932, as the date for completion of the work, as originally specified.

Articles 3 and 5 of the standard form of government contract provided for and authorized the defendant to make changes and to order extra work, and also provided that if such changes or extra work caused an increase or decrease in the amount due under the contract, or in the time required for its performance, an equitable adjustment should be made.

Plaintiff bases its claim for damages for delay alleged to have been caused by the defendant upon the contentions (1) that defendant caused a delay of 244 days in the completion of the original work called for by the contract due to the unusually large number of changes required and the manner in which they were directed to be made; (2) that these changes, and the job conditions resulting therefrom, increased overhead expenses and subjected plaintiff to many other costs and expenses which, otherwise, it would not have incurred; and (3) that for such overhead expenses and losses the defendant is liable under the contract as for a breach thereof.

The proof submitted does not establish that the defendant breached any provision of the contract by unreasonably interfering with or delaying the proper prosecution and perform-

ance of the original contract work, including the changes ordered; nor does the proof establish that any of the changes ordered were unreasonable as not being within the contemplation of the contract, or that the defendant, in the circumstances, unreasonably delayed the proper prosecution of the alleged contract work in making a decision with reference to any of the changes considered or ordered by it.

A total of 62 changes was made by defendant during performance of the contract, 56 of which involved additional work and resulted in an increase in the contract price in the total amount of $107,975.98. The remaining six changes decreased certain of the work originally called for and resulted in deductions from the contract price aggregating $27,295.75. The net increase in the contract price totaled $80,680.23, approximately $15,000 of which was profit realized by plaintiff. Each one of the changes made was the result of an agreement between the parties as to the exact amount to be paid therefor by the defendant or the amount to be deducted from the contract price for such work as was eliminated. Approximately 90 percent of all the structural and finishing work called for by the contract was performed by more than twenty independent subcontractors of the plaintiff in the various trades. The subcontractors furnished all labor and technical supervision. In connection with all changes or extras, the government sent the plaintiff drawings or specifications with reference thereto, and requested plaintiff to submit its proposals or bids therefor. The plaintiff, in turn, delivered the government's drawings or specifications to one or more of its subcontractors concerned with the particular work to which the changes or extras related and it obtained from the subcontractor in each case a bid to furnish all materials, labor, supervision, tools and equipment necessary in connection with the proposed change for extra work. The plaintiff, upon receiving the subcontractors' bids, added 10 percent for overhead and 10 percent of this total for profit in each case and submitted the total of the combined figures to the contracting officer as its proposal or bid for performing the change or additional work. These changes, as the contract contemplated would be the case, were considered and decided upon during performance by

plaintiff, or of its subcontractors, of the work originally called for by the contract, and, of necessity, some time was required in connection with the negotiations with plaintiff therefor as to the amounts to be paid as an increase to the contract price. Some stoppage and interruption of continuity of the original contract work unavoidably resulted, but the defendant cannot be held liable in damages for delay in completion of the original work called for by the contract due to changes authorized therein, unless it abused its privilege to make changes or otherwise unreasonably delayed the proper prosecution of the work in such a way and under such circumstances as to constitute a breach of some express or implied provision of the contract.

The evidence submitted in this case shows that the defendant did not breach its contract, and the evidence further shows that the changes considered and ordered by the defendant were reasonable. The evidence also establishes the fact that the defendant acted with reasonable promptness in the circumstances in considering and making decisions on the changes, or extras involved. The time which was necessary for the contracting officer's office to take in considering, estimating, and deciding upon the changes and bids therefor was due to the amount and pressure of work in the office of the Supervising Architect. In connection with the change involving the penthouse and proposed cafeteria on a portion of the seventh floor of the new addition to the post office, of which plaintiff seriously complains (finding 13), plaintiff's principal agent and supervising superintendent of construction, Langhorne, testified as follows:

> There was a great deal of detailed estimating in connection with the proposed change, involving about $117,000.00. * * *
>
> They submitted drawings outlining the complete cafeteria; we figured it up, and it amounted to one hundred and seventeen thousand and some dollars. There was a great deal of detailed estimating. There was kitchen equipment, electrical work, steel, masonry, concrete, and all that sort of stuff. The Supervising Architect's Office was literally swamped. They simply could not get their estimator to do the work in time. Mr. O'Brien [defendant's construction engineer] called that to my atten-

tion, and I suggested that it would be of great assistance if we sent our estimator to Washington to sit down with their estimator and say, "Here is how we arrived at our figures," and in that way save time. We sent our man down personally to facilitate action on this.

* * * * *

Q. Was action facilitated?

A. You might say that it was. The action was simply this, that they stated that they did not have the money to build it [the cafeteria].

Q. Did you discuss with Mr. O'Brien the question referred to in Exhibit No. 22? [Finding 13.]

A. Do you mean did I discuss this specific letter with him before it was mailed?

Q. The general subjects mentioned in it.

A. Yes. The general subjects mentioned in this letter were the occasion for the delays. The question of changes was almost a constant subject of discussion between the representatives of the Magoba Construction Company and the representatives of the Government.

The Government had on this work one of the most capable construction engineers I have ever seen since I have been in the business, and he was doing everything he possibly could to facilitate the work in every way. He knew, months ahead of time, that there was going to be a delay, and I took up with him the question of delay, particularly as to the application for an extension of the contract time within the prescribed 10 days after the delay occurred. He suggested this: "Unquestionably there is going to be, it is conceded, a considerable period of delay, and I suggest that you write the Department one letter, enumerating therein each specific case which involves a delay. I will make my recommendations on that, and the Government will reply thereto."

The contracting officer was liberal in the extensions of time granted plaintiff for completion of the work. Most of the delay in completion of the original contract work of which plaintiff complains, and for which the defendant was in nowise responsible, is shown from a study of the evidence to have been due to plaintiff's financial instability and lack of experience, skill, and professional ability to handle and perform successfully work of the magnitude involved under the contract in suit; the lack of proper preliminary planning, the synchronization and coordination by plaintiff of

the different parts of the work among the various subcontractors, and between them and the plaintiffs; the delays brought about by the duplication and overlapping of effort, and lack of diligence in proceeding with certain of the work in the early stages thereof; and the general confusion and loss of time resulting from such improper planning, coordination, and cooperation.

Plaintiff has failed to prove that any provision of the contract was breached by the defendant and has failed to prove any damage that can be fairly attributed to any act of the defendant, or its omission to act, contrary to any provision of the contract between the parties.

Plaintiff is therefore not entitled to recover and its petition is dismissed. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

HUNTER STEEL COMPANY, A CORPORATION, TO ITS OWN USE AND TO THE USE OF PEORIA PIPING & EQUIPMENT COMPANY AND STROBEL CONSTRUCTION COMPANY, SUBCONTRACTORS, v. THE UNITED STATES

[No. 43969. Decided June 7, 1943. Plaintiff's motion for new trial overruled October 4, 1943]

On the Proofs

Government contract; breach.—It is *held* that the evidence adduced does not establish, in view of the provisions of the contract with plaintiff and the concomitant contract with another contractor, that the defendant breached its contract with the plaintiff.

Same; contracting officer; sequence of work.—The proof is not sufficient to show that the defendant breached any provision of the contract with plaintiff by failure of the contracting officer to require another contractor to perform its work in sequence more convenient to plaintiff.

Same.—It is not established, or alleged, that the contracting officer acted arbitrarily or failed to exercise an honest judgment with regard to the question of how and in what order another contractor and plaintiff should proceed with their work.

Same; contractor's failure to protest.—Where plaintiff made no protest to the contracting officer that it was being unreasonably delayed and (except in one instance) made no claim to the contracting officer for any extra cost or unnecessary work or expense not contemplated by its contract; it is *held* that plaintiff is not entitled to recover.

Same; insufficient proof that contracting officer acted unreasonably.—In the one instance in which plaintiff made complaint as to delay on account of the sequence in which another contractor prosecuted its work, plaintiff's proof is not sufficient to show that the failure of the contracting officer to order and require the other contractor to carry on its work in an order of precedence different from that in which it was carried on was unreasonable and arbitrary.

Same.—The work required of plaintiff and the expense which it was necessary for plaintiff to incur in performing its contract are not shown by the evidence to have been more than was reasonably contemplated and necessary under the terms and conditions of the contract.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the brief.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $57,061.60 as damages for the alleged breach by the defendant of a contract with it for the fabrication, assembly, and installation of lock gates and machinery at Peoria Lock, Peoria River, near Peoria, Illinois.

The damages claimed are made up of alleged extra and unnecessary costs and expenses, in addition to those contemplated by and necessary under its contract, resulting from alleged unreasonable delay caused by another contractor for concrete construction work.

It is alleged that it was the duty of the government under the contract in suit to prevent this delay in performance of the concrete construction work by the concrete contractor and that defendant failed to perform its duty in this regard, thereby breaching its contract with the plaintiff.

The defendant contends that no breach by it of plaintiff's contract has been established; that plaintiff was not unreasonably delayed in the performance of its work by the de-

fendant's contractor for the concrete work; that the contract for concrete construction contemplated that there might be delay in its completion and that plaintiff's contract provided for the performance by it of the work thereunder within a specified time after completion of the contract work; that no action or inaction by the contracting officer prevented plaintiff from performing its contract during the time and in the manner reasonably contemplated; that plaintiff did not make any protest, as required by the contract, that it was being unreasonably delayed and did not make any claim, except in one instance (finding 19), during performance of the contract, or thereafter, for excess cost or expense for any work or time which it thought to be in addition to that contemplated and required by the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff is a Pennsylvania corporation with principal place of business in Neville Township, Allegheny County. Prior to September 1936, its name was Independent Bridge Company; in that month its name was changed by appropriate action to Hunter Steel Company.

2. July 8, 1936, the plaintiff entered into a contract with the United States, represented by S. N. Karrick, Captain, Corps of Engineers, Acting District Engineer, as contracting officer, whereby in consideration of the sum of $204,400, subject to increase or decrease according to actual quantities of material, the plaintiff undertook to furnish all plant, labor, and materials for constructing and installing (1) miter lock gates, (2) mitering gate operating machinery, (3) Tainter valves, (4) Tainter valve operating machinery, (5) oil piping for lock operation, and (6) miscellaneous items including Tainter valve bulkheads and lock emergency dams at Peoria Lock in the Illinois River near Peoria, Ill., all in accordance with specifications, schedules, and drawings. The work was to be commenced within 10 calendar days after date of receipt of notice to proceed, and to be completed within 150 calendar days after date of completion of the "lock masonry" contract at the site.

The contract and specifications are filed in evidence and are made a part hereof by reference.

3. At the time plaintiff's contract was entered into, the defendant had, on November 22, 1935, entered into a contract with the Great Lakes Dredge and Dock Company (hereinafter referred to as the Great Lakes Company), whereby that contractor was to (1) build the necessary cofferdam, maintain it, and eventually remove it, (2) make the excavation, piling foundation, and fill for the complete structures, (3) construct the masonry for the complete lock and guide walls, (4) make the esplanade fill and roadway, and (5) do other miscellaneous work. The Great Lakes Company was to commence work within 10 days after date of receipt of notice to proceed and complete the work within 365 calendar days thereafter. The liquidated damages for delay beyond that period were to be paid by the contractor, unless such delay was excusable under the terms of the contract. The period fixed for completion of this contract ended January 30, 1937. This was the "lock masonry" contract referred to in the plaintiff's contract.

The Great Lakes Company commenced its operations in January 1936. During the period January to June 1936 it cleared the site, constructed a highway, and excavated for, constructed, and pumped out the cofferdam. In this period it was granted extensions of time totalling 40½ days due to a strike, bad weather conditions, and a change order. During the period June to December 1936, it installed pumping equipment, drove the foundation piles and steel sheet cutoffs, and placed 23,500 cubic yards of concrete in the lock walls. During the period December 1936 to February 1937, it was unable to proceed with concrete operations because cold weather prevented excavation and the hauling of gravel for the concrete.

4. In the process of driving piles for the cofferdam on the Great Lakes Company's contract, underground springs were opened up necessitating constant pumping on a major scale in order to keep the cofferdam unwatered. On July 23, 1936, the contracting officer's representative communicated with the plaintiff by letter as follows:

> In connection with your contract for gates and machinery at Peoria Lock, we have a water condition there which I think would make it advisable to erect the lock

gates within the present cofferdam. I would suggest that you come or send some one to look over the situation.

Plaintiff's representative examined the premises, promised expedition in order to make use of the cofferdam, asked for like expedition in approval of drawings, and concluded in a letter of August 10, 1936, to the U. S. Engineer's office, as follows: "Have no doubt but that we can get this material out and installed before the first of the year if there is no unnecessary delay at any point." Plaintiff could thus have installed the gates under its contract if the Great Lakes Company had not been delayed, as set forth in these findings.

The Great Lakes Company originally intended to pour the walls of the lock prior to pouring the floor (to avoid moving heavy equipment over the floor), but due to the quantity of water encountered it revised its plans and constructed the floor first. For its own convenience the concrete contractor prepared a concrete schedule showing anticipated progress, a copy of which was furnished to defendant. This schedule indicated that the concrete contractor intended pouring concrete as follows:

(1) In the struts and floors between February 23 and April 15, 1937; actually the pouring was accomplished in the period February 26 to April 17, 1937.

(2) In the walls between April 15 and July 24, 1937; actually the pouring was done between April 18 and July 13, 1937. To speed up its pouring as much as possible, the Great Lakes Company built gantry tracks and purchased a half-million feet of lumber for extra forms.

5. Notice to proceed was received by the plaintiff July 25, 1936. Its first work was the construction of the gates, machinery, valves, and valve operating machinery, which was done at its shop near Pittsburgh, Pa., and constituted the major portion of the contract. The piping for operation of the locks was part of an oil hydraulic system and this was sublet by the plaintiff.

The material so fabricated was moved, in the main, by barges from the shop to the site of the work.

In May 1936, plaintiff realized that in all likelihood its work would not be completed prior to that of the concrete

contractor and that, accordingly, it would either have to make arrangements with the concrete contractor for the use of the cofferdam or it would have to use temporary shutter dams.

Plaintiff's specifications provided, section 1–03:

> (c) Work at the site is under contract and is now in progress on the construction of the lock masonry and esplanade fill, the entire contract being expected to be completed about January 30, 1937, unless delays occur. Cofferdam protection has been provided for the lock masonry construction and this protection will be available for protection of such work as is authorized to be executed under this contract prior to completion of the lock masonry.

Section 1–09 provided:

> *Cofferdam Protection.*—(a) The cofferdam protection provided under previous contract at the site for masonry construction will serve also as protection for such work under this contract as may be executed, prior to flooding and removal of the cofferdam, without interference with the proper and efficient execution of work under the previous contract. Work under this contract remaining to be done, after flooding and removal of the cofferdam provided under the previous contract, shall be executed with suitable approved protective structures and pumping equipment, provided and maintained by the contractor without separate payment for such necessary structures and attendant maintenance and pumping. The poiree bulkheads included under this contract may be used for this cofferdam protection.

Plaintiff, being unwilling to use the poiree bulkheads, entered into negotiations in May with the concrete contractor for the use of the cofferdam, plaintiff to supply the labor and materials. Nothing came of this conference. August 13, 1937, plaintiff was notified that the concrete contractor would finish its work August 23 and would not maintain the cofferdam thereafter. Plaintiff thereupon entered into an agreement with the concrete contractor to pay $5,750 a week for the use of the cofferdam, said amount to include all expenses. This was a fair price.

Section 1–13 (a) provided that the contractor should have the privilege of using Government controlled land at the

site not otherwise reserved by the contracting officer, as shown on Sheet 10/2.1. Sheet 10/2.1 is in evidence as a part of plaintiff's Exhibit No. 5 and is made a part hereof by reference.

Section 1-14, entitled "Order of Work," provided:

> (a) The work shall be carried on at such places and also in such order of precedence as may be found necessary by the contracting officer, and shall be constructed in every part in exact conformity with the location and limit marks, which will be indicated by stakes, lines, marks, or otherwise. The contractor will be required to arrange his construction schedule to cooperate fully with the schedule for lock masonry construction at the site in producing the completed structure with the greatest possible expedition.
>
> (b) Work on the lock emergency dams specified in Section XI shall be initiated immediately upon receipt of notice to proceed with the contract, and the dams shall be completed, shipped to the site, and stored ready for use as unwatering protection in case of necessity, within the shortest time practicable.

Section XI, so cited, had reference, among other things, to the lock emergency dams, which were "for installation in the recesses in the lock sills provided therefor above and below the mitering gates." With reference to these emergency dams Section XI went on to say:

> (b) Upon completion, the metal parts of each dam shall be temporarily installed in place at the respective locations to determine that all parts and connections are properly constructed, installed, and fitted. In event the dams are used as unwatering protection in the execution of work under this contract the contractor shall, upon completion of the work, remove the dams, make all necessary repairs to place them in good and serviceable condition as approved by the contracting officer, repaint all parts with two coats of aluminum paint, and store the dams as directed by the contracting officer, and no separate payment shall be made therefor.

Section 1-23 of the specifications read:

> *Interference with Other Contractors.*—The contractor shall not interfere with material, appliances, or workmen of the United States, or of any other contractor who may have work at this site. As far as practicable, all

contractors shall have equal rights to the use of all roads, grounds, and adjacent river. In cases of disagreement regarding such use, the decision of the contracting officer shall govern.

Article 9 of plaintiff's contract contained the usual standard provisions with reference to delays, notices in writing, extensions of time, and finality of decisions of the contracting officer.

Article 15 of the contract and paragraph 1–19 of the specifications provided the means for the settlement of disputes.

Plaintiff gave no notice of delay, made no claim for adjustment, except as hereinafter set forth in finding 19, and registered no protest pursuant to these provisions, except on one occasion, hereinafter mentioned in finding 11, it requested defendant to expedite the work of the concrete contractor.

6. Section 1–14 of the Great Lakes Company's contract specifications provided:

> *Order of Work.*—The work shall be carried on at such places and also in such order of precedence as may be found necessary by the contracting officer, and shall be constructed in every part in exact conformity with the location and limit marks, which will be indicated by stakes, lines, marks, or otherwise. * * *.

Section 1–24 of the Great Lakes Company's specifications was identical with section 1–23 of plaintiff's specifications relating to interference with other contractors.

Section 1–30 of the Great Lakes Company's specifications defined the site of the work as including all operations on the contract or subcontract regardless of location, except operations that were a part of the contractor's usual and current business and mingled with similar work, other than on the contract.

7. Both the plaintiff's contract and the Great Lakes Company's contract contained the following provision:

> ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting

officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

8. The erection of concrete monoliths by the Great Lakes Company at both ends of the lock was necessary for installation of the gates by plaintiff. The setting and installation of these gates was the only work of plaintiff in connection with which it would use the cofferdam of the Great Lakes Company. There was no requirement in either contract that the cofferdam of the Great Lakes Company be used for any of plaintiff's work. Plaintiff's contract stated (see finding 5) that the cofferdam would be available and could be used by plaintiff for such of its work "as is authorized to be executed under this contract prior to completion" of the contract of the Great Lakes Company insofar as plaintiff's use of the cofferdam did not interfere with performance of the Great Lakes Company's contract, but that any of plaintiff's work remaining to be done, after flooding of the cofferdam, should be performed by it with suitable approved structures and pumping equipment to be provided and maintained by the plaintiff without additional payment.

The expected date of completion of the Great Lakes Company's work was January 30, 1937, as indicated in plaintiff's specifications in section 1–03 (c), and plaintiff accordingly prepared to ship by barge and otherwise to the site in the fall of 1936. Plaintiff's fabrication in its shop near Pittsburgh had reached such a point in the autumn of 1936 that it planned to start erection of the lock gates about the middle of November 1936. When the plaintiff learned of the delays in the Great Lakes Company's contract, it postponed some of its activities and did not ship such of the parts as had already been prefabricated from Pittsburgh to the site of the dam.

Theretofore, in August 1936, the plaintiff, through a visit by its representative to the site, had found that the Great Lakes Company was encountering an unusually difficult situation, due to striking unanticipated underground water in the driving of piles, and extraordinary measures had to be taken to keep the cofferdam dry. The cofferdam was not defective and did not leak appreciably. Upon a view of the

situation and conferences with the Great Lakes Company and the government officials, plaintiff's representative concluded that the gate monoliths would be constructed in time to begin installation of the gates by the first of December 1936. This conclusion was not based upon any representations or assurances of government officials. No express promise was made to the plaintiff that the gate monoliths would in fact be erected by that time, ready for installation of plaintiff's gates.

Late in December of 1936 it became apparent to the plaintiff that installation of the gates could not be started before winter set in. Thereupon plaintiff informally requested of a subordinate official of defendant during a telephone conversation that installation of the gates be taken out of its contract. About the same time the plaintiff suggested, also informally, that the gates be assembled and, after assembly, be installed after flooding of the cofferdam. This procedure, involving a change in the contract requirements, was not acceptable and the plaintiff installed the gates within the cofferdam in the dry, as required by its contract. The proof does not show that had plaintiff's suggestion that it be permitted to assemble the gates and install them assembled after flooding of the cofferdam been made formally to the defendant and accepted, it would have resulted in a saving to plaintiff.

9. The Great Lakes Company's concreting operations could not be continued into the freezing weather without heating the concrete, and also because the freezing weather made it impossible for it to obtain the materials required by the contract. About the middle of December 1936, it shut down concreting operations and did not resume such work until after the freezing period had ceased. It was at this time that the plaintiff protested informally about the delay by asking that the installation of the gates be taken out of its contract.

About February 19, 1937, the Great Lakes Company furnished the government with a proposed schedule of further concreting operations. This schedule indicated pouring of the upper-gate monoliths, necessary for plaintiff's work of installation, sometime between May 15 and June 1, 1937, and

a copy of this proposed schedule was furnished the plaintiff. The Great Lakes Company did not meet the schedule in this particular, and the representatives of the plaintiff and the defendant conferred over the situation at Peoria, Illinois, on May 26, 1937. At this conference it was represented to plaintiff that the Great Lakes Company had promised to have one set of monoliths, those at the upper end, ready for plaintiff by June 15, 1937, with unwatering of the cofferdam sometime in August, following.

10. The contracting officer was at all times fully informed of plaintiff's desire to complete its work without delay and that it was ready and able to proceed in such manner as to complete its work in accordance with the originally scheduled date of completion of the Great Lakes Company's work on January 30, 1937; and, also, of its desire to complete its underwater work before the Great Lakes Company finished its concrete work and was ready to flood the cofferdam.

Had the Great Lakes Company been able to follow its schedule precisely, plaintiff could have commenced its work about May 19, 1937. But operations were delayed for three reasons:

(1) In the period January to May 1937, the operations of the concrete contractor were delayed by high water and, upon application, its time for completion was extended 48 days.

(2) May 15, 1937, the concrete contractor encountered a large artesian spring in the vicinity of the upper-gate monoliths which interrupted work at that point. This spring discharged 6,000 feet of water a minute and was only placed under control by filling the hole with large masonry blocks. It was not until June 5, 1937, that the Great Lakes Company was able to resume concrete operations in the vicinity of the upper-gate monoliths.

(3) It is seldom possible to exactly conform pouring operations to an anticipatory progress schedule; some of the forms warp or are rejected by Government inspectors and have to be rebuilt, and some carpenters work faster than others. On this job the concrete contractor had a fleet of 17 vessels hauling materials for concrete and, in order to keep them moving, it poured whatever forms were ready, regardless of schedule. If the concrete contractor had adhered to

its original schedule of February 19, 1937, regardless of such conditions, it would have been further delayed and would have had greater expenses.

As a consequence, the pouring of the upper-gate monoliths was delayed, and plaintiff did not commence active work until about July 6, 1937. Preparations for work, however, were commenced by plaintiff's subcontractor, the Strobel Construction Company, on June 18, 1937.

11. The plaintiff in complaining to the contracting officer of the delay occasioned by the Great Lakes Company forwarded to that officer a copy of a letter of complaint from its subcontractor, the Strobel Construction Company, which company was to erect the metal work, and addressed him July 13, 1937, as follows:

> We are enclosing herewith a copy of letter from Strobel Construction Company, our subcontractor for erection of metal work on the Peoria Lock.
>
> Due to the fact that the Great Lakes Dredge & Dock Company has digressed materially from their proposed pouring schedule, we have not been able to erect any of our material to date and it now appears that there will not be sufficient time for us to complete our work before the general contractor is ready to flood.
>
> In view of the fact that we may have to complete our work with shutter dam protection, we respectfully request that you exercise your right under article 1–14 of the Great Lakes Dredge and Dock Company specifications to bring about the most expeditious completion of the upper gate sections of the foundation work, and all recesses for imbedded material so that the shutter dams can be installed at the earliest possible moment in case of necessity.

The shutter dam referred to was an emergency dam operative at times, other than at high water, for the purpose of unwatering the lock chamber and for making repairs to the gates.

There is no evidence to show what action, if any, the contracting officer took on plaintiff's letter with reference to the order of the work being performed by the Great Lakes Company in completion of the upper-gate sections of the lock walls. There is no proof that under paragraph 1–14 of the specifications (see finding 5) the contracting officer

failed to perform his duty under the contract, exceeded his authority thereunder, or acted arbitrarily or capriciously, or that his action or inaction was grossly erroneous as to imply bad faith. No appeal was made by plaintiff to the head of the department.

12. Plaintiff was able to begin installation of the gates the last of July 1937 and not before, because of delay by the Great Lakes Company. Plaintiff's work under its contract was finished well within the agreed time of 150 days after completion by the Great Lakes Company; so much of its work as was installed in the dry was finished around September 7, 1937. If plaintiff could have started about May 15, 1937, it could have completed the underwater work around July 1, 1937. Had the Great Lakes Company's work progressed to the point where the plaintiff could have begun on May 15, the Great Lakes Company would have flooded the cofferdam before August 23, 1937.

The Great Lakes Company notified the government on August 9, 1937, that it would be ready to flood the cofferdam by August 23, and the contracting officer notified the plaintiff August 13, 1937, that in view of this situation the plaintiff should make such preparations as were necessary to protect its work at that time, viz., August 23, 1937. The Great Lakes Company was ready to pull the cofferdam August 23, 1937. Plaintiff decided that it would be more convenient to its operations if the cofferdam were maintained in place until September 7, 1937. It accordingly made arrangements with the Great Lakes Company with reference thereto.

13. Plaintiff had doubts that the use of shutter dams at the upper end of the lock, instead of the cofferdam, in the installation of the lock gates would be successful.

The contracting officer did not require the Great Lakes Company to leave the cofferdam intact, and to maintain it and keep it dry after August 23, 1937, the scheduled date of its flooding. There was no obligation upon him to do so. The Great Lakes Company was not required by its contract to leave the cofferdam intact, and to maintain it and keep it dry after August 23, 1937, the scheduled date of its flooding. As early as May 1937, the plaintiff had discussed the

charge that the Great Lakes Company might make use of the cofferdam after that company had finished its work. The plaintiff considered it desirable to come to an agreement with the Great Lakes Company for the use of the cofferdam after August 23, 1937, which it did on August 17, 1937, after negotiation, and under this agreement plaintiff paid to the Great Lakes Company the sum of $13,500. This was a fair price for the services performed. Had plaintiff been able to make its underwater installation prior to August 23, 1937, this expense would not have been incurred.

14. A part of plaintiff's contract work was the installation of all steel hydraulic oil piping for operation of the lock machinery. Plaintiff sublet this work to Peoria Piping and Equipment Corporation the first part of 1937. The subcontractor started on this work July 6, 1937, the earliest date possible in view of the state of the work being done by the Great Lakes Company.

Practically all the main lines of piping were to be laid in trenches in the walls of the lock. The subcontractor did not wait until all sections of the lock walls were completed, but followed the Great Lakes Company as forms were torn off the top sections of concrete. This work did not depend upon the cofferdam or the flooding thereof.

This work of the subcontractor was finished November 10, 1937. Plaintiff's contract with the subcontractor provided that the work should be prosecuted as fast as conditions permitted, and there was no time limit set.

The work of the subcontractor was a normal follow-up job and there is no satisfactory proof that with respect to its work either the subcontractor or the plaintiff incurred any expense over and above contract agreements.

15. During the period January 1 to June 30, 1937, plaintiff's overhead applicable to the contract here in suit, and so charged on its books, was $5,922.67.

The material required on the contract was fabricated by plaintiff in the fall of 1936 for erection between November 15 and December 1, 1936. After fabrication it was painted with a shop coat and stored. The plaintiff, due to lack of progress at the site of the lock, had to keep the material

in storage until the following spring and had to clean and again handle and paint this material before shipping. The cost of this extra work was $1,209.20.

Plaintiff kept an engineer on the job. The salary of this representative from May 15 to July 15, 1937, during which time plaintiff was unable to proceed, was paid by the plaintiff in the amount of $575.

Plaintiff sent materials to the site in two barges. The first arrived May 21 and was unloaded July 7, 1937. The second arrived June 26 and was unloaded August 10, 1937. For this delay plaintiff paid demurrage charges in the sum of $820. Plaintiff did not bring in and set up equipment to unload the barges until June 20, 1937. However, plaintiff claims that this delay in unloading was due to lack of space.

Specifications 1–23 provided:

> 1–23. *Interference with other Contractors.*—The contractor shall not interfere with material, appliances, or workmen of the United States, or of any other contractor who may have work at this site. As far as practicable, all contractors shall have equal rights to the use of all roads, grounds, and adjacent river. In cases of disagreement regarding such use, the decision of the contracting officer shall govern.

There is no evidence that plaintiff ever requested a ruling by the contracting officer in regard to space for its materials inside the cofferdam of the Great Lakes Company, or ever lodged any complaint. Nor was any ruling made by the contracting officer.

In the fall of 1936 plaintiff bought white oak buffer timbers for the miter gates. They could not be placed as early as plaintiff had anticipated and by July or August 1937, when this work was performed, some of the timbers, to the value of $225.79, had warped and cracked, and could not be used. Plaintiff lost the cost of these timbers.

Article 6 of the contract provided:

> (a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. * * *

Article 15 of the contract provided:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 1–19 of the specifications provided:

> If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter or be considered as having accepted the record or ruling.

There is no evidence that plaintiff protested the ruling of the inspectors or contracting officer, or in any way gave defendant notice of a claim for the timbers.

16. Plaintiff planned to unload the barges by means of a 10-ton derrick placed on top of the cofferdam. This operation would have required the concrete contractor to shift its power lines and, for a short time, to cut off the pumps, and would have endangered the entire project and subjected the concrete contractor to a half-million dollar loss in the event the cofferdam caved in. Consequently, the concrete contractor refused to permit plaintiff to locate its derrick on the cofferdam unless plaintiff furnished a bond guaranteeing the concrete contractor against loss. This plaintiff was unwilling to do and the derrick was moved inside the cofferdam, necessitating an additional handling of the steel. Plaintiff paid its subcontractor $184.35 for rehandling. No claim for this or any other amount was ever made by plaintiff, nor was defendant's attention ever directed to the dispute with the concrete contractor.

17. In order to keep down the rental charges of the Great Lakes Company for the use of the cofferdam to a minimum,

plaintiff requested of the Government permission to employ its workmen overtime and this permission was granted, and the plaintiff also requested its subcontractor for the erection of steel, the Strobel Construction Company, to work its men overtime. The subcontractor acceded to this request and paid overtime wages to its men of $4,166.32. The insurance and pay roll tax thereon was $713.27, making a total of $4,-879.59, which was reimbursed to the Strobel Construction Company by plaintiff. Incidental concreting was done for the Strobel Construction Company by one Otis Williams. His overtime amounted to $344.20, which plaintiff also paid.

18. Plaintiff, in the fall of 1936, had a caterpillar crane, air compressor, and locomotive crane at Red Wing, Minnesota, which it had allotted to the Peoria job expecting to send them down there the fore part of November 1936. The shop near Pittsburgh asked for their use, but plaintiff was unwilling to send the equipment to Pittsburgh because it desired it to be held in readiness for the Peoria job, where it might be needed at any time. Other equipment accordingly had to be set up at the shop near Pittsburgh and the equipment at Red Wing lay idle because of the postponement of the Great Lakes Company's work on the Peoria Lock. The equipment at Red Wing was eventually used on another job and the work for which it was assigned at Peoria was sublet by the plaintiff to the Strobel Construction Company which used its own equipment.

The fair rental value on the equipment at Red Wing was $150 a month. Plaintiff hired a watchman for the equipment at Red Wing at a wage of $150 a month. On this item plaintiff claims rental and wages for five months, November 1, 1936, through March 31, 1937, a total of $1,500.

Plaintiff's subcontract with the Strobel Construction Company was entered into on March 15, 1937, and presumably was negotiated sometime prior to that date. The value of the substitute equipment or of its use at the shop near Pittsburgh is not sufficiently proved.

19. Plaintiff did not request any specific area for unloading at the lock site, nor did it notify the contractor of its

proposed procedure for unloading. Prior to plaintiff's arrival on the site, the concrete contractor placed electric lines and a discharge pipe across the cofferdam in the most practical location available. Plaintiff, upon its arrival, requested the concrete contractor to move them to another location as plaintiff desired to unload its barges at that point. The concrete contractor agreed to accommodate plaintiff provided plaintiff would bear the expense of moving the pipe. Plaintiff acquiesced, and paid the cost of $652.83. Plaintiff made a claim against defendant for this amount, and it was denied by the contracting officer. No appeal was taken. The decision of the contracting officer was correct.

20. Plaintiff entered into its contract with the Strobel Construction Company on March 15, 1937, for unloading of barges, erecting and riveting structural steel, and the placing of machinery at the Peoria lock and dam. This subcontractor expended more for labor than it had estimated therefor. This was due to an increase in wages actually paid over the wages it had anticipated paying. The evidence does not justify a finding that this difference is attributable to any act or acts upon the part of the defendant. The Strobel Company was inexperienced in this type of work and underestimated the normal labor cost.

Certain equipment of the Strobel Construction Company was ready for use May 15, 1937, but it could not be put into operation until the Great Lakes Company had finished the work preparatory to that of installation. The fair and reasonable rental value of this equipment for the period of idleness was $554.34.

21. If plaintiff had completed all the work in the year 1936 the expenditures for old-age and unemployment insurance by its two subcontractors would have been less by $647.40, distributed as follows:

Strobel Construction Co	$542.20
Peoria Piping, etc., Corp	105.20
	647.40

Other items of the claim are not established by the evidence concerning them.

22. There is no evidence of presentation of any item of the claim to the contracting officer, or of findings of fact by that officer touching any of the items in suit, except as stated in findings 11 and 19.

23. Plaintiff was not unreasonably delayed in the performance and completion of the work called for by its contract by the Great Lakes Company, or by any action or inaction of the government in a manner or in such circumstances as would constitute a breach of any express or implied provision of plaintiff's contract.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

More than seven months prior to the date on which plaintiff entered into the contract in suit with the defendant, the government had entered into a contract with the Great Lakes Dredge and Dock Company, herein sometimes referred to as the "masonry contractor" or the "concrete contractor," to make the excavations, fills, foundations for the structure, esplanade fill and roadway, to construct the masonry for the lock and guide walls, and to perform certain other miscellaneous work. This contract provided for the completion of the work called for therein within 365 days after receipt of notice to proceed and contemplated that the work might not be completed within the period fixed. It was stipulated in art. 9 that if the contractor failed to complete the work on time it would pay the government liquidated damages for such delay as was not excusable under the provisions of that and other articles, and that for excusable delays the specified period for completion would be extended.

Plaintiff's contract was for the construction, assembly, and installation of lock gates, Tainter valves, operating machinery for the gates and valves, oil piping, valve bulkheads, and lock emergency dams in the concrete masonry work by the Great Lakes Company under its contract with the defendant. Plaintiff's contract was made in the light of the existing contract for the concrete lock structures in which the lock gates called for by plaintiff's contract were to be

installed, and provided in par. 1–06 (a) of the specifications that "The contractor will be required * * * to complete the entire work within 150 calendar days after the date of completion of the lock masonry contract at the site * * *. All parts of the work shall be prosecuted as vigorously as practicable during all seasons of the year." Par. 1–03 (c) of plaintiff's contract specifications set forth that "Work at the site is under contract and is now in progress on the construction of the lock masonry and esplanade fill, the entire contract being expected to be completed about January 30, 1937, unless delays occur."

The plaintiff completed its contract far in advance of 150 days after date of completion of the lock masonry contract but seeks to recover, as damages, alleged unnecessary increased costs in performance of its contract by reason of alleged failure of the masonry contractor to prosecute its work properly and expeditiously and the failure of the contracting officer to require the masonry contractor to perform its work in a sequence and during such time as would enable the plaintiff to finish its work earlier.

The petition alleges that plaintiff's contract contemplated the delivery and installation of the lock gates and metal work before January 30, 1937, while the existing cofferdam of the Great Lakes Company was in place; that it prepared to proceed accordingly but was unreasonably delayed because the Great Lakes Company delayed in its work; that "under its contract plaintiff should have had this service [cofferdam protection] without cost to it;" and that the total sum claimed as damages "represents the added or extra cost plaintiff and its subcontractors incurred in the performance of its contract by reason of the failure of the defendant to require the contractor for the foundation work, its agent in that behalf, to proceed with its work in such a manner as would not unnecessarily interfere with or delay the plaintiff's work under its contract." Upon these allegations it is contended that the defendant breached plaintiff's contract by permitting, or causing, it to be unreasonably delayed and is therefore liable in damages for the increased costs and expenses which plaintiff would not have incurred had the

lock masonry contract been completed by January 30, 1937, or within a reasonable time thereafter.

The facts as shown by the evidence do not establish, in view of the provisions of the contract with plaintiff and the contract with the Great Lakes Company, that the defendant breached its contract with the plaintiff. It is true that the Great Lakes Company was delayed in completion of its contract with the defendant beyond the period ending January 30, 1937, and that this delay resulted in the inability of plaintiff to install the lock gates until about five months after expiration of the period fixed for completion of the masonry contract, but this is not enough to entitle plaintiff to recover. The proof fails to show that the defendant caused, or was responsible for, any of this delay or that the delay experienced by the Great Lakes Company in the completion of its contract was unreasonable in the circumstances. During the period December 1936 to February 1937, the Great Lakes Company was unable to proceed with its concrete operations due to unusually cold weather which prevented excavation and hauling of gravel for the concrete. The masonry contractor was required to obtain its concrete aggregate from a special gravel pit, opened and operated as a government work-relief project, about 25 miles up the river from the site of the work. The pump which extracted the gravel would not operate in very cold weather because of ice forming on the belts and pulleys. The masonry contractor obtained as much gravel as it could, consistent with available storage space, before operations had to be suspended at the gravel pit. The Great Lakes Company had originally intended to pour the concrete lock walls prior to pouring the concrete floor of the lock passage in order to avoid moving heavy equipment over the floor but, due to the unexpectedly large quantity of water encountered and the variations in the composition of the river bed, it revised its plans and first constructed the concrete floor. In the period from January to May 1937 the Great Lakes Company's operations were delayed by high water and, by reason of this, its time for completion was extended 48 days.

May 15, 1937, the Great Lakes Company encountered a large artesian spring in the vicinity of the upper gate mono-

liths, which was an unforeseen and unanticipated condition which interrupted the work at that point. This spring discharged about 6,000 gallons of water per minute and was placed under control only after considerable difficulty and expense. The Great Lakes Company was unable to resume concrete operations in that vicinity until June 5, 1937.

In the circumstances under which the work was required to be performed by the Great Lakes Company, it was never possible for it exactly to conform pouring operations to an anticipatory progress schedule for the reasons that some of the concrete forms warped, or were rejected by the government and had to be rebuilt, and that some carpenters work faster than others. In addition, the Great Lakes Company had on this project a fleet of 17 vessels hauling materials and, in order to keep them moving, it poured concrete in whatever forms were ready to receive it, regardless of its anticipated schedule of operation. This was reasonable and proper. If the Great Lakes Company had undertaken strictly to adhere to its schedule which it had previously indicated it would endeavor to follow, regardless of such conditions, progress of the work would not have been continuous and the work would have been further delayed. None of the causes which operated to delay the Great Lakes Company in the prosecution and completion of its work was attributed to the fault of anybody, and certainly not to the fault of the government. As a consequence of the delay mentioned, the construction by the Great Lakes Company of the upper gate monoliths, where plaintiff was to install gates, was delayed and plaintiff did not commence active work in the erection of the gates until about July 6, 1937. Under its contract the plaintiff assumed the risk of such delay in completion of the work which was necessary for the installation of the gates called for by its contract.

The proof is not sufficient to show that the defendant breached any provision of plaintiff's contract by failure of the contracting officer to direct and require the Great Lakes Company, under par. 1-14 of the specifications (finding 6) of the Great Lakes Company's contract and, also, of plaintiff's contract (finding 5), to carry on and perform the masonry work in a sequence, or order of precedence, differ-

ently from that in which the Great Lakes Company performed the concrete construction work called for by its contract. The question of how and in what order the Great Lakes Company and plaintiff should proceed with their work was one for decision by the contracting officer under paragraph 1–14 of the specifications and article 15 of the contracts, and it is not alleged in the petition or established by the evidence that he acted arbitrarily or failed to exercise an honest judgment in that regard. *Burchell* v. *Marsh*, 17 How. 344, 349, 350; *Kihlberg* v. *United States*, 97 U. S. 398, 401; *United States* v. *Gleason*, 175 U. S. 588, 602; *Ripley* v. *United States*, 223 U. S. 695, 701, 702; *United States* v. *Rice, et al.*, 317 U. S. 61. Moreover, plaintiff made no protest to the contracting officer that it was being unreasonably delayed and it made no claim to the contracting officer, except in one instance, for any extra cost for extra or unnecessary work or expense not contemplated by its contract. Par. 1–19 of plaintiff's contract, entitled "Claims and Protests," provides as follows:

> If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter or be considered as having accepted the record or ruling. (See Articles 3 and 15 of the contract.)

The only letter which might be considered in the nature of a protest written by plaintiff to the contracting officer was the letter of July 13, 1937, set forth in finding 11. In this letter plaintiff called to the attention of the contracting officer the fact that it had been unable to erect any of the material under its contract, because the Great Lakes Company had digressed materially from its proposed pouring schedule, and stated that it appeared there would not be sufficient time remaining for plaintiff to complete its work before the Great Lakes Company was ready to flood its cofferdam, which plaintiff desired, under specifications 1–03 and 1–09, to use without expense prior to the completion by the Great Lakes Company of its contract. In this circum-

stance plaintiff requested the contracting officer to take action under par. 1–14 of the Great Lakes Company's contract specifications "to bring about the most expeditious completion of the upper gate sections of the foundation work, and all recesses for imbedded material so that the shutter dams can be installed at the earliest possible moment in case of necessity." The shutter dam referred to which was to be installed by plaintiff was an emergency dam operative at times, other than at high water, for the purpose of unwatering the lock chambers and for making repairs to the gates. The evidence does not show what action, if any, the contracting officer took upon receipt of this letter from plaintiff. The contracting officer was familiar with the state of plaintiff's work and the way in which the Great Lakes Company was performing, as well as the circumstances under which the work was being performed, and it would appear that he was satisfied after receipt of plaintiff's letter with the progress of the Great Lakes Company and the manner in which it was performing its work. In any event, plaintiff's proof is not sufficient to show that failure of the contracting officer to order and require the Great Lakes Company to carry on its work in an order of precedence different from that in which it was carried on was unreasonable or arbitrary.

Paragraphs 1–03 and 1–09 of plaintiff's specifications contemplated that delays might occur in the lock masonry work. Paragraph 1–03 stated only that cofferdam protection provided by the masonry contractor would be available to plaintiff "for protection of such work as is authorized to be executed [by plaintiff] under this contract prior to completion of the lock masonry;" and paragraph 1–09 specifically stated that any of plaintiff's work "remaining to be done, after flooding and removal of the cofferdam" by the Great Lakes Company "shall be executed with suitable approved protective structures and pumping equipment, provided and maintained by the contractor without separate payment for such necessary structures and attendant maintenance and pumping." The work required of plaintiff and the expense which it was necessary for it to incur in performing its contract have not been shown to have been more than was reasonably contemplated and necessary under the terms and conditions of its contract.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

SEA GULL LUBRICANTS, INC., AN OHIO CORPORATION (TO THE USE OF THE NATIONAL ACME COMPANY AND THE LAMSON & SESSIONS COMPANY, OHIO CORPORATIONS), v. THE UNITED STATES

[No. 45081. Decided June 7, 1943. Plaintiff's motion for new trial overruled October 4, 1943]

On the Proofs

Excise tax on lubricating oils applicable to cutting oils.—Cutting oils manufactured or compounded for use in the cutting of metals, are *held* to be lubricating oils and accordingly subject to the tax imposed upon lubricating oils under section 601 (c) (1) of the Revenue Act of 1932, and the pertinent Treasury Regulations (Regulation 44, Article 11). 47 Stat. 259; U. S. Code, Title 26, section 3413.

Same; process of lubrication.—In the process of metal cutting the use of an oil substance to prevent adhesion between cutting tool and the metal to be cut is a process of lubrication.

Same; intent of Congress.—It cannot be supposed that Congress, when it imposed a tax on lubricating oils, did not intend to tax oils which the makers advertised as lubricating oils and sold as such; and which are generally referred to in the trade as lubricating oils.

Same; discrimination; constitutionality.—The fact that cutting oils are ordinarily sold at a very much lower price than some lubricating oils, not cutting oils, does not make the tax discriminatory when other lubricating oils sell for as little, or almost as little, as some cutting oils.

The Reporter's statement of the case:

Messrs. Peter Reed and *Ashley M. Van Duzer* for the plaintiff. *McKeehan, Merrick, Arter & Stewart* and *Orrin B. Werntz* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is an Ohio corporation with its principal place of business in Cleveland. The C. H. Clark Oil Company, hereinafter referred to as Clark, is a subsidiary corporation of plaintiff and acts as a selling agent for it. Plaintiff is engaged in the manufacture and sale of oils used in metal cutting operations and of oils used for lubricating moving parts of machinery.

2. During the period June 1935 to November 1938, inclusive, plaintiff sold to Clark certain oil under the trade name "Elaine Oil," which oil was in turn sold by the latter company to The National Acme Company, hereinafter referred to as Acme. When the oil was sold by plaintiff to Clark, federal excise taxes at the rate of four cents per gallon, the rate of tax provided under the appropriate revenue statutes for lubricating oils, were shown as a separate item on the invoices and the amounts so shown were collected by plaintiff from Clark. When the sales were made by Clark to Acme, the excise taxes were invoiced by the former to the latter separately at the same rate and in due course paid by the latter to the former.

3. During the period June 1935 to December 1938, both inclusive, Clark made sales of oil having the trade name "Clark's X Cutting Oil," to The Lamson & Sessions Company, hereinafter referred to as Lamson, which oil had been acquired from plaintiff in the same manner as the oil referred to in the preceding finding as having been acquired and sold to Acme. The same procedure was followed as to excise taxes. During the same period Clark also sold to Lamson a mineral oil under the trade name "Trifilm B 50," which oil was likewise acquired from plaintiff. On all sales to Lamson, excise taxes at the rate indicated in the preceding finding were billed as separate items and were paid by that company as such.

4. For the period June 1935 to December 1938, both inclusive, plaintiff, as manufacturer and producer, duly filed excise tax returns covering its sales of oil to ultimate consumers and paid the tax shown due thereon which was computed at four cents a gallon, the rate of tax provided in the revenue statutes as the tax on lubricating oils. Included among the taxes so paid were taxes on the "Elaine Oil" and "Clark's X Cutting oil," heretofore referred to, as follows:

Period	Amount of tax	Date of payment
June 1935	$51.94	July 25, 1935
July 1935	74.14	Aug. 15, 1935
Aug. 1935	21.90	Sept. 26, 1935
Sept. 1935	52.04	Oct. 29, 1935
Oct. 1935	76.91	Nov. 26, 1935
Nov. 1935	34.42	Dec. 28, 1935
Dec. 1935	43.97	Jan. 30, 1936
Jan. 1936	67.03	Feb. 28, 1936
Feb. 1936	54.99	Mar. 27, 1936
Mar. 1936	58.73	May 1, 1936
Apr. 1936	61.39	May 27, 1936
May 1936	50.51	June 23, 1936
June 1936	62.98	July 29, 1936
July 1936	77.85	Aug. 27, 1936
Aug. 1936	43.82	Sept. 23, 1936
Sept. 1936	49.87	Oct. 28, 1936
Oct. 1936	71.11	Dec. 1, 1936
Nov. 1936	43.92	Dec. 30, 1936
Dec. 1936	50.44	Jan. 23, 1937
Jan. 1937	94.38	Feb. 25, 1937
Feb. 1937	88.77	Mar. 24. 1937
Mar. 1937	69.90	Apr. 23, 1937
Apr. 1937	119.13	May 26, 1937
May 1937	92.44	June 25, 1937
June 1937	76.73	July 28, 1937
July 1937	44.25	Aug. 27, 1937
Aug. 1937	74.51	Sept. 28, 1937
Sept. 1937	50.49	Oct. 26, 1937
Oct. 1937	22.34	Nov. 26, 1937
Nov. 1937	39.43	Dec. 30, 1937
Dec. 1937	37.27	Jan. 27, 1938
Jan. 1938	22.56	Feb. 24, 1938
Feb. 1938	13.40	Mar. 29, 1938
Mar. 1938	43.89	Apr. 28, 1938
Apr. 1938	37.19	May 28, 1938
May 1938	22.36	June 29, 1938
June 1938	22.28	Aug. 3, 1938
July 1938	2.06	Aug. 30, 1938
Aug. 1938	35.48	Sept. 30, 1938
Sept. 1938	22.40	Oct. 22, 1938
Oct. 1938	35.35	Nov. 29, 1938
Nov. 1938	35.45	Dec. 30, 1938
Dec. 1938	44.47	Jan. 24, 1939
Total	2,194.49	

5. Acme and Lamson entered into agreements with plaintiff February 27, 1938, and March 2, 1939, respectively, under which it was agreed among other things that plaintiff should file and prosecute a claim for refund of the taxes referred to in the preceding finding, and that any credit or refund

resulting therefrom should inure to the benefit of the appropriate vendee, that is, Acme or Lamson. Appropriate consent has also been secured from Clark.

6. March 10, 1939, plaintiff filed a claim for the refund of the excise taxes paid on the sales of its cutting oil to Acme and Lamson hereinbefore referred to, in the amount of $2,194.49, and assigned the following grounds therefor:

> 1. The oil on which said excise tax was paid was not "lubricating oils" within the meaning of Section 601 (c) (1) of the Revenue Act of 1932.
> 2. The oil on which said excise tax was paid was not "lubricating oil" within the meaning of Article 40 of Regulations 44.
> 3. The oil on which said excise tax was paid was used as a cutting fluid and not in such manner or for such purpose as to render it taxable under such statute.
> 4. The oil on which said excise tax was paid was purchased and used by the ultimate consumers solely as a cutting fluid. The use to which it was put included many non-lubricating factors. Among its primary functions were those of cooling, slushing, and chip removal in connection with the manufacture of metal parts by machine tool. Whatever lubricating function, if any, it may be found to have served was sufficient neither in respect of volume nor character to render it taxable as "lubricating oils" within the meaning of said section.
> 5. Such oil so used was not lubricating oil, nor was it sold or used as lubricating oil, nor for lubricating purposes, so as to be subject to the excise tax provided in said section standing alone or as interpreted by Article 40 of Regulations 44.
> 6. Section 601 (c) (1) of the Revenue Act of 1932 is unconstitutional since it violates the Fifth Amendment of the Constitution of the United States in that, as to the consumer of cutting fluids, it is an unreasonable deprivation of its property without due process of law, because it imposes upon cutting fluids, which are sold in relatively large volume at a relatively low price per gallon, the same tax in cents per gallon and a much greater tax in percentage of cost than that which is imposed upon lubricating oil products sold for purposes other than as cutting fluids and which are sold in relatively small quantities and at a relatively high price per gallon.

The claim was not accompanied by the exemption certificates referred to in Treasury Department Regulations 44

for the reason that the Commissioner of Internal Revenue would not permit their use in connection with the products in question.

7. October 19, 1939, the Commissioner rejected plaintiff's claim for refund, his letter of rejection concluding with the following statements:

> Section 601 (c) (1) of the Revenue Act of 1932, as amended, imposes a tax of 4 cents a gallon on lubricating oil sold by the manufacturer or producer thereof. It is provided in article 40 of Regulations 44 (revised September 1934) that the term "lubricating oil" includes all oils, regardless of their origin, which are sold as lubricating oils and all oils which are sold or used for lubrication.
>
> The above-mentioned section of the Act imposes the tax on lubricating oils and no attempt is made to show what was meant by the term "lubricating oils." While under a strict interpretation of the law all lubricating oils could have been held properly subject to the tax, the Bureau, by regulations, limited the application of the tax to only those lubricating oils which are sold as such and those oils which are sold or used for lubrication.
>
> The question of the taxability of lubricating oils used in cutting and machining operations on metals has been given careful consideration by the Bureau and it has been consistently held, based upon an opinion from the National Bureau of Standards, that oils so used involve lubrication and are properly subject to tax.
>
> Since the tax in question was paid on lubricating oils sold to your customers for cutting and machining operations on metals, it is held that such tax was properly due and paid and the claim is rejected in full.

8. The "Clark's X Cutting Oil" oil purchased by Lamson, the taxes on which are a part of those in controversy, was a mineral-base cutting oil compounded from mineral oil, animal fat, sulphur and chlorine, the composition having been prepared by plaintiff prior to the sale to Lamson. It was sold by plaintiff and purchased by Lamson for use as a cutting oil on cutting and threading machines. These machines have separate lubricating systems to lubricate all bearings and rotating surfaces. For this latter purpose, Lamson purchased other oil from plaintiff under the name "Trifilm B 50," the taxes upon which are not here in controversy.

The latter was a purely petroleum product, a mineral oil. The sale price of Clark's X Cutting Oil was substantially less than that of the Trifilm B 50 oil. The cutting oil was not used by Lamson to lubricate the bearings or rotating surfaces of the machines.

9. The oil purchased by Acme, taxes on which are a part of those in controversy, was a commercial form of oleic acid sold under the name "Elaine Oil." It was a fatty acid derived from lard oil. It was sold by plaintiff and purchased by Acme for use in combination with other substances as a cutting oil. It was ordinarily mixed with a base mineral oil to which had been added chlorine and sulphur. Oleic acid is the organic acid which constitutes the acid part of most fatty oils. While it is not generally considered a good lubricant of itself because of its active and corrosive qualities, it is a common additive to mineral oils in compounding cutting oils and extreme pressure lubricants. Acme manufactures automatic screw machines and also products made on automatic screw machines, lathes, and similar metal-working equipment. These machines have four to eight spindles, each spindle performing a separate cutting operation. They are so made that each moving part and bearing surface is lubricated by a suitable lubricating oil supplied through a separate system and no part of the Elaine Oil was used for that purpose. The bearing surfaces of the machines are sealed off, as far as possible, from any contact with the cutting oil, since the cutting oil corrodes the bearing surfaces, and carries metal particles gathered from the cutting operation, into the bearings. Cutting oil also forms a gummy precipitate when used in bearings.

10. In its most general sense a lubricant is any material that tends to reduce the friction of moving parts. A dictionary definition of a lubricant is a substance possessing such properties that it will, when interposed between moving parts of machinery, make the surfaces slippery and reduce friction, eliminate asperities and prevent cohesion between the lubricated surfaces. A cutting lubricant is defined as a lubricant or cutting compound, as lard oil or soap water, that serves both as coolant and lubricant for metal-cutting tools.

From these general definitions of lubricants have been derived various terms which are descriptive of different types of lubricants and different types of lubrication. The commonly understood process of lubrication is what takes place when a film of oil is interposed between adjacent and relatively moving parts with the result that there is actual prevention of contact between the opposing surfaces, thus eliminating or reducing frictional resistance. In its simplest form it is illustrated by the ordinary journal and bearing where after the oil is inserted in the first instance, the rotation of the journal within the bearing draws the film in until there is complete separation of the metallic surfaces by the film of oil. This type of lubrication is almost, if not entirely, mechanical or physical, rather than chemical, in its nature. It is referred to by various terms, including fluid, wedge, and hydrodynamic film lubrication.

Another type of lubrication commonly recognized by experts in that field, but little understood by laymen, is boundary or border lubrication where there is more or less complete contact between the moving parts but molecular films exist on the surfaces of each moving part or are created there by chemical action. Closely related to and considered by some as of the same type is what is called thin film lubrication. The latter represents the extreme upper limits of fluid film lubrication on the one hand and the lower limits of boundary lubrication on the other. Its action is largely of a chemical nature similar to that arising in boundary lubrication.

Another type of lubrication generally recognized in the lubricating field and by mechanical engineers is extreme pressure lubrication which is characterized by a chemical reaction between the lubricant and the bearing surface to form films of lower shear strength than the bearing surfaces and thus prevent seizure and reduce friction. A common use of a lubricant of this character is in the hypoid differential gears of automobiles where pressures of 300,000 to 400,000 pounds per square inch may prevail. Except at very low pressures, its action is largely chemical as opposed to the physical action which takes place in fluid film lubrication. In many

respects its action is similar to that of thin film and boundary lubrication. The principal additives which are combined with fatty and mineral oils to produce extreme pressure lubricants are chlorine and sulphur which are likewise common additives to these oils in compounding cutting oils.

11. Metal cutting consists of the removal of a chip or shaving from a piece of metal, usually referred to as the "work" or "work piece." At times this removal is done by hand but ordinarily it is done by machine tools, such as automatic screw machines, lathes, and tools of related functions. Similar results are accomplished by grinding operations. When metal cutting is done on a lathe, a single-point tool is involved. In grinding operations an abrasive tool or implement is used as the cutter.

Most metal-cutting operations are carried out with the use of metal-cutting fluids, though during the past five years considerable progress has been made in dry cutting, largely by the use of tantalum carbide tools which are operated at very high speeds. These findings, however, deal with the situation presented when cutting fluids are used and, unless otherwise indicated, the references are to the cutting of ductile metals with single-point machine tools.

12. Cutting fluids as used in commercial operations ordinarily consist of varying combinations of the following substances: fatty oil, mineral oil, soluble oil, soap, soda, sulphur, chlorine, aliphatic compounds, phosphoric esters and water.

13. Until recent years little was known of what takes place in a metal-cutting operation in the area where the chip is separated from the work piece. One earlier idea was that the chip of metal splits off ahead of the tool in a manner similar to what occurs when a block of wood is split, and on that basis the theory was advanced that there was a crack or opening ahead of the point of the tool into which the cutting oil penetrated and thereby lubricated the tool and the work. At the present time some oil companies advertise their product on the basis that their cutting fluids act in that manner.

However, the view now coming to be accepted by men engaged in scientific research on the subject is that at least

in the case of ductile metals the separation of the chip from the workpiece takes place in a shearing, rather than a splitting, operation wherein there is a plastic deformation of the crystals in the workpiece under extreme pressure and a sliding of the crystals along their fracture planes over what is known as the "built-up edge" of the tool. This action is described as similar to what occurs when a snow plow operates. The "built-up edge" consists of metal from the work piece which adheres to the tool a short distance back of the point of the tool shortly after the cutting operation begins and continues, either in its original form or as replaced, until the cutting is completed. At most times and during most operations the built-up edge rather than the point of the tool is in contact with the work piece and accomplishes the separation of the chip from the work piece. At the high speeds at which commercial cutting is done, there is no crack or space, other than of molecular dimensions, in the metal ahead of the point of the tool or in the immediate area where the separation of the chip from the work piece is accomplished. These molecular dimensions are in terms of millionths of an inch.

14. The pressure between the tool and the work piece is high, ordinarily ranging from 100,000 to 300,000 pounds per square inch and the temperatures generated are likewise high, 800° to 1200° Fahrenheit. Fluid or hydrodynamic oil films will not withstand such pressures and temperatures except possibly momentarily. A pressure of 1,000 pounds per square inch is considered an extremely heavy load for a film of oil and the temperature destruction point of an oil film is less than the minimum temperature limits involved in the ordinary metal-cutting operation.

15. Regardless of the pressures and temperatures involved and other factors, cutting oils are extensively used in metal cutting and when used aid in accomplishing the desired results, including satisfactory machine output, desired finished surface of the material being worked on, and tool life. In approved commercial practice, the entire area where the cutting is to take place is flooded with the cutting oil prior to the time the cutting begins and it continues to

be so flooded throughout the cutting operation. This flooding is ordinarily achieved by having jets of oil directed at the area where the tool cuts the work piece, in a continuous stream of from ten to eighty gallons per minute.

The functions served by the cutting oils when used in that manner are: (1) to cool the work piece and thereby prevent it from being machined in a distorted shape, and to cool the tool and thereby increase its useful life; (2) to serve as an anti-weld or anti-seizure substance whereby friction is reduced between the work piece and the tool and the chip and the tool; (3) to wash away the chips or cuttings; and (4) to perform the foregoing functions without causing rust and corrosion such as would occur if water, the best cooling liquid known, were used instead of a cutting oil.

16. The second function of cutting oils set out above, namely, that of serving as an anti-weld or anti-seizure substance or medium, is recognized as one of the important primary functions of cutting oils as used in commercial cutting. It is scientifically explained in general terms as follows: Metal surfaces are normally covered with films of molecular thickness which are sometimes referred to as adsorbed films. Both the surface of the tool and the surface of the work piece are so covered with a film when the cutting operation begins. Freshly ruptured metal is in a nascent, that is, chemically clean, state, and that nascent surface is in an extremely active condition. As the cutting operation advances the surface of the tool encounters that nascent surface of the work piece which, because of its active condition, progressively robs the surface of the tool of its adsorbed film, thus tending to produce another nascent surface. When two such chemically clean surfaces come in contact adhesion develops, that is, the normal reaction is for the two surfaces to weld or seize and thus build up frictional resistance. The cutting fluid is used to prevent such seizure or welding. The application of a cutting fluid sets up, under the pressures and temperatures which develop, a chemical reaction which results in the constant or intermittent replacing of the adsorbed film by the formation of new compounds, such as oxides or chlo-

rides, having shear strength less than the metal which is being cut. This tends to prevent welding or seizure. This reaction takes places between the chip material and the tool in the region of the point of the tool where high pressures and temperatures prevail. These pressures and temperatures greatly facilitate the desired reactions of the additives which are, as stated in finding 12, a part of the cutting fluid. Whatever physical or mechanical action, that is, fluid film lubrication, takes place, if any, is of a minor or incidental character, occurring only at the beginning of the operation, or at points some distance from the point of the tool.

The actions described above are primarily due to the presence in cutting oils of additives, such as sulphur or chlorine. The base oil in the cutting oil acts as a carrier for the additives and the base oils and the additives are separated only when the chemical action takes place. The chemical actions are similar to those which occur in extreme pressure lubrication where similar additives are used. Ordinary mineral lubricating oils such as are used in fluid film lubrication described in finding 10 are generally not satisfactory cutting oils for high-speed commercial cutting, and cutting oils are generally not satisfactory for the uses performed by the oils which are ordinarily used for lubricating the moving parts of the machinery.

17. Many large manufacturers of cutting oils advertise their cutting-oil products as lubricants and for their lubricating qualities. In some instances such manufacturers have little scientific knowledge of the action of the cutting oils in a metal-cutting operation or of the mechanics involved in the operation. In some instances, they explain and illustrate in their advertising the action which takes place in a manner that connotes film lubrication. In other instances alleged lubricating actions are explained by analogy to extreme pressure lubricants and with reference to the chemical actions which take place.

18. Large quantities of cutting oils are sold, the manager of one of the large oil manufacturers estimating that 100,000,000 to 150,000,000 gallons are sold annually in this country.

19. The substances, the taxes on which are here in question, were oils. As used, one of their principal purposes was to prevent friction or adhesion between the surfaces of metal cutting tools on the one hand and the pieces of metal which are being cut by those tools, and the chips or shavings which are cut from those pieces, on the other. This prevention was lubrication and the oils used to accomplish it were lubricating oils.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the federal excise tax of four cents a gallon which it paid on two types of cutting oil sold by it, through the Clark Company, a subsidiary, to purchasers who intended to use, and did use, the oils in metal cutting operations. The Commissioner of Internal Revenue classified the cutting oils as "lubricating oil," within the meaning of the Revenue Act of 1932, C. 209, Sec. 601,[1] and taxed them as such. He also denied a timely claim for refund filed by plaintiff.

Plaintiff contends that cutting oils, manufactured or compounded for use in the cutting of metals, are not lubricating oils and are therefore not subject to a tax which applies only to lubricating oils.

The substances in question were oils. One of the two types taxed to plaintiff, called "Clark's X Cutting Oil", was compounded from mineral oil, animal fat, sulphur and chlorine. The other kind, sold as "Elaine Oil", was a commercial form of oleic acid, a fatty acid derived from lard oil. The purchaser of it mixed it with a base mineral oil, to which had been added chlorine and sulphur. They were always designated as oils, and no contention seems to have been made, either before the Commissioner of Internal Revenue or here, that they were not. Our question therefore is not whether they were oils, but whether they were lubricating oils.

The applicable Revenue Act simply taxed "lubricating

[1] 47 Stat. 169.

oils" without further defining them. The Treasury Regulations likewise gave no definition of the word lubricating.[2]

In S. T. 505, XI–2 Cumulative Bulletin (1932) at page 448 appears the following:

> Regulations 44, Article 11: Scope of tax.—*Cutting oils and water soluble oils used for lubricating purposes held taxable.*—Advice is requested whether cutting oils and water soluble oils are lubricating oils and subject to the tax under section 601 (c) 1 of the Revenue Act of 1932.
>
> Under Treasury Decision 4339, issued July 16, 1932 (see page 446), any oil having both lubricating and nonlubricating uses is taxable when sold or used for lubrication.
>
> Cutting oils and water soluble oils, used in cutting and machining operations on metals are used for lubricating purposes and are therefore held to be taxable under section 601 (c) 1 of the Revenue Act of 1932, when sold by the manufacturer or producer.

Plaintiff urges that the statement in the third paragraph of the quotation as to the operation of cutting oils is erroneous; that they do not, in the uses for which they were bought from plaintiff, lubricate in the sense in which Congress used that word. Plaintiff urges that the meaning of the word lubricating as applied to oils, both in the statute here applicable and in common speech relates to the process of inserting a film of oil between two moving parts such as a crankshaft and the bearings in which it turns, or a piston and the wall of the cylinder in which it moves.

As shown in finding 10, if the pressure of the moving parts upon each other is great the film is squeezed very thin, and the pressure and accompanying heat may produce a chemical change in the oil, so that what keeps the moving metals from seizure and wear is not a film of liquid, but a molecular film of substance resulting from the chemical reaction in the oil, which substance is deposited on the metal surfaces.

The ideal lubricating fluid, then, to use in situations where this kind of pressure or heat exists or may develop is one which will serve as a film lubricant until the pressure or heat develops which makes it impossible for it to serve

[2] Treasury Regulations 44 (Revised September, 1934).

longer as such, but which contains substances which, under the pressure or the heat, will, as a result of the resulting chemical changes, deposit the kind of nonfluid molecular film which will best keep the moving metal parts from wearing each other. Some of these substances have been discovered to be animal fats, or oleic acid, sulphur and chlorine. Mineral oils or greases containing such additives are used to lubricate the hypoid differential gears of automobiles, where very high pressures are developed.

In the process of metal cutting several problems must be taken account of. If the process is one of grinding, or cutting on a lathe, and if the speed and duration of the process is such as to produce great heat, the cutting instrument should be cooled to prevent it from being damaged, and the "work piece", or metal which is being cut should be cooled to keep it from being distorted. This cooling is accomplished by flooding the area where the tool meets the work piece by jets or liquid pouring from ten to eighty gallons a minute. Water is the best liquid coolant, but it is not used for this purpose. The liquid poured upon the work also serves to wash away the cuttings or chips. This purpose would also be served by water. Another important purpose which the liquid must serve is to serve as an antiweld or antiseizure agent to reduce the friction between the tool and the work piece, and between the tool and the chip or cutting, if there is a substantial body to the cutting. This last purpose would not be served by water, and oil is the substance which is actually used to facilitate metal cutting, since it satisfactorily serves all three purposes.

The freshly cut metal, being chemically clean, is in an active or nascent condition which causes it to tend to adhere to other like surfaces. The tool, likewise, is scraped clean and there would be adhesion between the two, if their condition of cleanness were not cured by the constant restoration of a film of nonnascent substance. In the beginning of the cutting operation, before the heat and the pressure become great, there may be a period, depending on the speed and nature of the operation, during which this nonnascent substance is the liquid oil itself. This

would seem to be true when pipe or bolt threading or metal drilling or planing is carried on at slow speeds. There is seizure if no oil is used, and ordinary mineral oil prevents the seizure. But when the heat and pressure are great, friction and adhesion are still prevented, by the use of cutting oil, though the oil loses its fluid nature at the point of contact of the tool and the metal. The reason why it still prevents adhesion seems to be that, when it is converted by heat and pressure, the oil and its sulphur and chlorine additives produce substances which are deposited on the tool and the metal and thus prevent the surfaces from being clean and nascent, and tending to adhere.

This whole process seems to us to be a process of lubrication. Its purpose is to render the tangent surfaces slippery so that they will move upon one another instead of sticking. The fact that the industry which produced cutting oils called the process lubrication is significant. The fact that, even after persons producing or selling cutting oils became tax-conscious, plaintiff's witnesses who thought the word lubrication was not the proper word for the process, had no other generic term to describe it, is significant. It cannot be supposed that Congress, when it imposed a tax on lubricating oils, did not intend to tax oils which their makers advertised and sold for the purpose of lubrication. In statutes, as in ordinary speech, words mean what those who commonly used them suppose them to mean, unless a strong case is made to show that the legislature, or other user of the words, actually intended otherwise. Here there is no such showing.

Plaintiff urges that, by interpreting the tax statute as including cutting oils within its scope, we encounter a constitutional problem, because cutting oils are cheaper than ordinary lubricating oils, and therefore a tax of four cents a gallon, applied to them, is so heavy a burden as to make the tax discriminatory as to them. The only factual basis offered for this argument is that some lubricating oils, not cutting oils, retail for as much as $1.40 per gallon, while cutting oils retail at from 10 to 30 cents per gallon. But the $1.40 price is far above the average price for oils which are concededly taxable, and many such oils sell for

as little, or almost as little, as some cutting oils. No serious constitutional question is presented by these facts. Plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM H. COWLES, JR., v. THE UNITED STATES

[No. 45669. Decided June 7, 1943. Plaintiff's motion for new trial overruled October 4, 1943]

On the Proofs

Income tax; income from trust distributed under discretionary power of trustees taxable to beneficiary.—Where it is found that the income in the instant case was income distributed to plaintiff under a discretionary power lodged in the trustees by the provisions of a trust of which plaintiff was the principal beneficiary; it is *held* that such income was taxable to plaintiff under the provisions of section 162 (c) of the Revenue Act of 1934, which provides that income "which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated" is to be deducted from the gross income of the trust and is to be included in the income of the beneficiary for tax purposes.

Same; no exception as to distribution at termination of trust.—No exception is made by the statute (48 Stat. 680, 728) of income distributed at the time of the termination of the trust.

Same; trust income distributed on date certain; cases distinguished.—The case in suit is not controlled by the decisions in *Roebling* v. *Commissioner*, 78 Fed. (2d) 444; *Spreckles* v. *Commissioner*, 101 Fed. (2d) 721; and *Commissioner* v. *Clark*, 134 Fed. (2) 159, in each of which the income was required by the trust instrument to be distributed on a date certain and not under a discretionary power lodged in the trustees under a trust instrument.

Same; intention of Congress.—The statute (48 Stat. 680, 728) clearly provides for a deduction from the gross income of the trust of income to be distributed currently and also of income distributed pursuant to a discretionary power in the trustee, as in the instant case; and if the trustee is not taxable on such income and it is not included in the beneficiary's income, then it would escape taxation altogether, which was not the intention of Congress.

Same; interpretation of statute by parties not controlling on the court.—Whether or not the parties agree on some other interpretation, it is the duty of the court to render judgment in accordance with the court's interpretation of the statute involved.

Same; Deparment of Justice cannot confess judgment in Court of Claims.—The Department of Justice has no power to confess judgment in the Court of Claims.

The Reporter's statement of the case:

Mr. William N. Haddad for the plaintiff. *Messrs. Bell, Boyd & Marshall* were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows, upon the stipulations entered into and filed by the parties:

1. Plaintiff is a citizen of the United States and a resident of the State of Washington.

2. March 15, 1935, plaintiff filed with the Collector of Internal Revenue for the District of Washington, an income tax return for the calendar year 1934, showing a net income of $135,545.46 and a tax of $45,062.04, which was paid by the plaintiff in four equal installments on March 15, June 10, September 13, and December 5, 1935, respectively. This return included the amount of $76,307.75 income from the William H. Cowles, Jr., Trust for the period from May 1, 1934, to December 21, 1934.

3. The William H. Cowles, Jr., Trust was created by plaintiff's father, William Hutchinson Cowles, on March 1, 1922. A true copy of the agreement creating that trust, together with all the amendments thereto, is attached to plaintiff's petition and marked Exhibit A. It is made a part hereof by reference. By the terms of this trust agreement as amended by the joint action of the trustees and the beneficiary on May 25, 1933, the trustees were directed, so long as plaintiff was under 35 years af age, to pay to him, if he demanded it, the net income of the trust estate up to $15,000 per year, and they were authorized in their discretion to pay to him all or such part as to them seemed best of the

remainder of the income of the trust estate. The original trust agreement provided that after the time William H. Cowles, Jr., attained the age of 30 years the trustees should pay to him, if he demanded it, the entire net income of the trust or of the undistributed portion thereof in convenient installments. Any part of the net income not so demanded was to be accumulated and added to the principal. The trust agreement further authorized the trustees in their absolute discretion to distribute to plaintiff such part of the principal of the trust estate as he might request in advance of the times otherwise specified for distribution in order to enable the plaintiff to start in business or for any other purpose which the trustees deemed worthy. As to the principal and accumulated income, plaintiff was to receive, if he demanded it, one-third of it at the age of 35 and the balance at 40. He was given a general testamentary power over any part not received before his death, and in default of the exercise of the power it was to go to his lineal descendants or, if none, to the heirs of his father as defined in the trust instrument.

Harriet C. Cowles, plaintiff's mother, was alive in 1934, and was a trustee of the trust until its termination in December 1934. William Hutchinson Cowles, the creator of the trust, is still living.

4. December 19, 1934, plaintiff requested that the entire principal of the trust estate be transferred to him. The text of his request was as follows:

> Pursuant to Section 1 of Article I of that certain Trust Agreement dated March 1, 1922, by and between William Hutchinson Cowles, party of the first part, and Alfred Cowles, Thomas Hooker Cowles, Harriet C. Cowles and Harriet Cowles, parties of the second part, I, William H. Cowles, Jr., do hereby request that the entire principal of the Trust Estate under said Trust Agreement be paid, transferred and delivered to me together with all unexpended accumulations thereon to be thereafter my own individual property absolutely, and that all accrued and accumulated income in said Trust Estate be distributed immediately to me.

December 21, 1934, the trustees distributed to the plaintiff the entire corpus of the trust estate, thereby terminating the trust.

5. The trustees under the agreement above mentioned kept their books and made their income tax returns on the basis of a fiscal year beginning on May 1 and ending on April 30. During the period from May 1 to December 21, 1934, the trustees received taxable income amounting to $76,307.75. They reported this income on a fiduciary return filed for that period but claimed it as a deduction from gross income and did not pay any income tax thereon. Plaintiff included the income within his income and paid the tax thereon.

6. July 29, 1936, plaintiff filed with the Collector of Internal Revenue for the District of Washington a claim for refund of 1934 income taxes in the amount of $43,534. This claim presented other issues which were later withdrawn and are not material in this case. March 12, 1938, plaintiff filed with the said Collector an amended claim for refund of 1934 income taxes in the amount of $43,638.40. This claim incorporated, among other issues, the issue upon which this suit is based, namely, whether the income for the trust for the period May 1 to December 21, 1934, was taxable to the plaintiff or to the trustees. A true copy of this claim and of the rider attached thereto are attached to plaintiff's petition as Exhibit B, and are made a part hereof by reference.

7. This claim for refund was disallowed by the Commissioner of Internal Revenue and notice of disallowance was mailed to plaintiff by registered mail on April 29, 1940, a copy of which notice is attached to plaintiff's petition as Exhibit C, and is made a part hereof by reference. In this notice it was stated that in consideration of the settlement of the income tax liability of William H. Cowles, Sr., father of plaintiff, for the year 1934, plaintiff agreed to the withdrawal of his claims for refund of 1934 income taxes and agreed not to prosecute any claim for such refund based on certain issues contained in an agreement dated November 18, 1939. A true copy of this agreement is attached to plaintiff's petition as Exhibit D, and is made a part hereof by reference. (The "William H. Cowles, Jr., (Chicago) Trust" referred to in this agreement is the same trust as the one above mentioned.)

8. No action upon plaintiff's claim for refund filed March 12, 1938, has been taken by Congress or by any department

of the Government other than the action taken by the Treasury Department as above set forth. No assignment or transfer of the claim or any part thereof or of any interest therein has been made and plaintiff is the sole owner thereof.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover income taxes paid by him for the year 1934, which taxes, he argues, should not have been paid by him but by a trust of which he was the principal beneficiary. The tax rate would have been lower if the tax had been assessed against the trust, because the income of the trust was smaller than plaintiff's income. Plaintiff is willing to have subtracted from the amount which he paid and here sues for, the amount which, he urges, the trust should have paid.

Plaintiff was the principal beneficiary of the William H. Cowles, Jr. Trust, set up by plaintiff's father in 1922 when plaintiff was a few months less than 20 years old. He was, if he demanded it, to receive the principal and the accumulated income, one-third at the age of 35 and the balance at 40. In case of his death before receiving the principal, he was to have a general testamentary power of appointment of it, in default of the exercise of which it was to go to his lineal descendants or, if none, to the heirs of the father. The original trust instrument provided that, after plaintiff reached the age of 30 years, the trustees should pay plaintiff, if he demanded it, the entire current net income of the trust. Upon his request the trustees were authorized, in their discretion, to turn over any or all of the principal to him at any time.

Plaintiff reached the age of 30 on July 23, 1932. On May 25, 1933, plaintiff and the trustees agreed in writing that plaintiff's right to receive, upon his demand, the entire current income of the trust after he reached 30 should be restricted, until he reached 35, to a right to receive a maximum of $15,000 per year of the income, but the trustees in their discretion might pay him all or any part of the remainder.

The trustees used a fiscal year beginning May 1. From May 1 to December 21, 1934, the trustees received taxable income of $76,307.75. On December 19, 1934, plaintiff requested, pursuant to the original trust agreement, that the trustees turn over to him the principal and accumulated income of the trust. The trustees on December 21, 1934 acceded to this request, turned over all the trust property, including the $76,307.75 of accrued income, and thereby terminated the trust. The trustees reported the receipt of this income, but claimed the right to deduct it and paid no tax on it. Plaintiff included the $76,307.75 in his individual income tax return for 1934, and paid his tax accordingly. He later concluded that the $76,307.75 was properly taxable not to himself but to the trust and filed a claim for refund, which was denied. This suit followed.

We are presented with an unusual situation in this case. The defendant in its brief says:

> Plaintiff herein takes the position that the income in question was income which was to be distributed in the discretion of the fiduciary under Section 162 (c), that it was accumulated and paid over as a part of the corpus and hence that it is not taxable to the plaintiff under a number of decisions, among which are *Roebling* v. *Commissioner*, 78 F. 2d, 444 (C. C. A. 3d); *Spreckels* v. *Commissioner*, 101 F. 2d, 721 (C. C. A. 9th); and *Commissioner* v. *Clark* (C. C. A. 2d), decided January 26, 1943 [134 F. 2d, 159], (1943 Prentice-Hall, par. 66,432). The *Roebling* case held that where income was to be distributed in the discretion of the fiduciaries, it was taxable to them rather than to the beneficiary even though it was actually distributed along with corpus during the taxable year due to the termination of the trust. The other decisions cited are to the same effect. In view of these decisions we do not contend that where income, which under the terms of the trust instrument is to be distributed in the discretion of the fiduciaries, is accumulated and paid to the beneficiary as a part of the corpus, it is taxable to the beneficiary.

We are, however, of the opinion that this case is not controlled by the decisions cited. In each of the cases cited the income was required by the trust instrument to be distributed on a date certain. In none of them was the income distributed under a discretionary power lodged in the trustee by the

trust instrument. The income in the case at bar was distributed under a discretionary power and comes squarely within the terms of section 162 (c) of the Revenue Act of 1934 (48 Stat. 680, 728). This subsection provides:

(c) In the case of income * * * which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the * * * trust the amount of the income of the * * * trust for its taxable year, which is properly paid or credited during such year to any * * * beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the * * * beneficiary.

If the income with which we are concerned in this case is income "which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated," the Act expressly provides that it is to be deducted from the gross income of the trust and is to be included in the income of the beneficiary. We do not think there can be any question but that this income was income which might or might not be distributed in the discretion of the trustees. Section 2 of the trust instrument provides:

So long as said William H. Cowles, Jr., shall be under the age of thirty (30) years, the Trustees *may in their discretion* pay to him all or such part *as to them shall seem best* of the net income of the Trust Estate, * * * Any part of such income not used or applied as aforesaid shall be accumulated and added at the end of each year to the principal of the Trust Estate. * * * (Italics ours.)

After the beneficiary became thirty years old he entered into an agreement with the trustees providing for the payment to him upon his demand of the net income of the trust up to $15,000 a year. After this agreement he was entitled to demand no more, but the trustees were still authorized in their discretion to "pay to him all or such part as to them shall seem best" of the remainder of the income of the trust estate. The trust instrument further provided that—

* * * The Trustees, however, anything hereinabove to the contrary notwithstanding, are authorized *in their absolute discretion* to pay, transfer, and deliver from

time to time to said William H. Cowles, Jr., such part of the *principal* of said Trust Estate as he may request in advance of the times hereinabove specified for the payment of principal to him, in order to enable him to start in business or for any other purpose which the said Trustees shall deem worthy. (Italics ours.)

Within the taxable year and prior to the time that plaintiff had arrived at the age of thirty-five years, at which time the trust instrument provided for a distribution of one-third of the principal, plaintiff requested the trustees to deliver to him the entire principal of the trust estate. In compliance therewith and in the exercise of the discretionary powers lodged in them by the trust instrument, they distributed to him the entire principal and all the accumulated income and the income accrued within the taxable year. The distribution was one which the trustees had a right to make or had a right to withhold. Therefore, the conclusion is inescapable that the income in question was income "which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated," and, therefore, comes expressly within the provisions of section 162 (c) providing for the deduction from the gross income of the trust of the amount of such income and for the inclusion thereof in the income of the beneficiary.

Section 161 of the Revenue Act of 1934 provides:

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

There can be no doubt, therefore, that these trustees were required to include in their income tax return the specific income with which we are concerned in this case. But section 162 provides:

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) * * * and in the case of income which, in the discretion of the fiduciary, may be either distributed to

> the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

These sections, therefore, plainly provide for the inclusion within the *gross* income of the trust of the specific income with which we are dealing, and they provide also for the deduction of this specific income in the computation of the *net* income of the estate; and, providing for the deduction of this income from the gross income of the trust, they provide, on the other hand, for its inclusion in the income of the beneficiary.

No exception whatsoever is made of such income distributed at the time of the termination of the trust, and we can see no reason for making such an exception. What was distributed was income of the trust; it was not corpus. Had the trustees at this time distributed nothing but the income accrued within the taxable year, it certainly would have been taxable to the beneficiary. For what reason should it not be taxable to him because at the same time not only income but also principal was distributed? Suppose only one-half of the principal had been paid the beneficiary and all of the income accrued within the year, and the trustees had retained the other half of the principal, would not the income be taxable to the beneficiary? What difference does it make that all of the principal was distributed and the trust terminated?

We said that the cases cited by the defendant in its brief are not authority on the question we have before us. In the *Roebling* case the trustees were required to deliver to the beneficiary, upon his arrival at the age of 21 years, the principal and accumulated income of his share of the trust. The provisions of 162 (c) were not involved. The Government insisted that the income distributed to him upon his arrival at the age of 21 years was income "which is to be distributed currently by the fiduciary to the beneficiaries." Such income was also deductible under subdivision (b) of section 219 of the Revenue Act of 1926, which was

reenacted as section 162 (b) of the Revenue Act of 1934. The court held that this income was not income "which is to be distributed currently by the fiduciary to the beneficiaries," but that, on the contrary, it was a distribution of the principal of the trust fund at the time required by the trust instrument.

The same question was involved in *Spreckels* v. *Commissioner*, *supra*, that is, whether or not income distributed on the arrival of a date fixed by the trust for the payment to the beneficiary of the principal and income was "income which is to be distributed currently by the fiduciary to the beneficiaries." The court held that it was not.

Judge Healy dissented. He thought it was income which was to be distributed currently.

The first case cited was a decision by the 3rd Circuit, and the second was a decision by the 9th Circuit. The same question was presented to the 2nd Circuit in *Commissioner* v. *Clark*, 134 F. (2d) 159, and that court held that such income was not income which was to be distributed currently. No one of these cases had presented to it the question presented to us, whether or not income payable to a beneficiary within the discretion of the trustees at the time of the termination of the trust was deductible from the gross income of the trust and includable in the income of the beneficiary.

Neither the 9th Circuit nor the 2nd Circuit concerned itself with whether or not income distributed at the termination of the trust was a distribution of income or a distribution of principal, but the only question discussed by either of them was whether or not such income came within the definition of income which is to be distributed currently. The 3rd Circuit in the *Roebling* case held that it was not income to be distributed currently, but further said that it was not income at all, but that it was distribution of principal.

We are unable to follow this holding. It was a distribution of all the property of the trust, but it was a distribution not only of the original trust property but also of the accumulations thereon. It was the distribution of income ac-

crued within the taxable year and income accumulated in prior taxable years. Manifestly, though, the beneficiary was taxable, if at all, only on the income accrued within the taxable year because the Act clearly provided for the taxation to the trustee of income accumulated within prior taxable years, and not distributed to the beneficiary. The beneficiary was taxable only on the income accrued in the taxable year which was to be distributed to him currently. The distribution of income accrued within the taxable year was a distribution of income, and not a distribution of corpus.

Certainly Congress intended that some one should pay taxes on this income. It was not intended that it escape taxation altogether, and the Act clearly provides for a deduction from the gross income of the trust of income to be distributed currently and also of income distributed pursuant to a discretionary power in the trustee. If the trustee is not taxable on such income and it is not to be included in the beneficiary's income, then it escapes taxation altogether. Such, we are sure, was not the intention of Congress. See *Helvering* v. *Butterworth*, 290 U. S. 365, 369. Yet this is the result achieved if the holding of the *Roebling* case is correct, to wit, that the distribution to the beneficiary is not a distribution of income but of principal.

In the case just cited the Supreme Court said:

> * * * The evident general purpose of the statute was to tax in some way the whole income of all trust estates. If nothing was payable to beneficiaries, the income without deduction was assessable to the fiduciary. But he was entitled to credit for any sum paid to a beneficiary within the intendment of that word, and this amount then became taxable to the beneficiary. Certainly, Congress did not intend any income from a trust should escape taxation unless definitely exempted.

But whether the *Roebling* case was properly decided or not, we have no doubt that the Revenue Act of 1934 required the trustee in the first instance to include within its gross income that income with which we are here concerned, and expressly provided for its deduction by the trustee in computing its net income and for its inclusion within the income of the

beneficiary. The Act expressly says that income distributable within the discretion of the trustee and actually distributed shall be deducted by the trustee, and it expressly says that such income shall be included in the income of the beneficiary. The income in question comes precisely within the language of the Act.

Congress has said that this income is to be included in the income of this plaintiff, and we are of the opinion that it is our plain duty to render a judgment in accordance with our interpretation of the Act of Congress, whether or not the parties agree on some other interpretation. The Department of Justice has no power to confess judgment in this court.

We are of the opinion that the plaintiff is not entitled to recover. His petition, therefore, is dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

The Government in its brief, after referring to the case of *Roebling* v. *Commissioner*, 78 F. 2d 444 (C. C. A. 3d), and other decisions says "In view of these decisions we do not contend that where income, which under the terms of the trust instrument is to be distributed in the discretion of the fiduciaries, is accumulated and paid to the beneficiary as a part of the corpus, it is taxable to the beneficiary."

According to the stipulation of the parties, this income was accumulated and paid to the beneficiary as a part of the corpus. If force were given to the stipulation and concession, the only way in which the Government would, ordinarily, hope to win this case would be by persuading the court that this income was not "to be distributable in the discretion of the fiduciary" within Section 162 (c) of the Revenue Act, and was not, therefore, governed by the concession made in the brief.

The Government, in its brief, then proceeds to urge that the income here in question, when it came to the trust, was income "to be distributed currently," within the meaning

of Section 162 (b) of the Act, and was therefore taxable to the beneficiary, whatever its ultimate disposition. It bases this argument upon the original trust agreement, disregarding the 1933 modification of it, apparently as being beyond the powers of the trustees to consent to.

No member of the court, as I understand it, is persuaded by the Government's argument. But the majority of the court, disregarding the Government's concession that income to be distributed in the discretion of the trustees is not taxable to the beneficiary if it is distributed as corpus, hold that income which was to be distributed in the discretion of the trustees, and which, according to the parties' stipulation, was accumulated and distributed as corpus, was nevertheless taxable to the beneficiary under Section 162 (c).

It is unusual, of course, to decide a case in favor of a party on a legal ground which that party has conceded, at least for the purposes of the instant suit, to have no validity. It means that the court has had no assistance from the briefs or oral arguments of either party. It means that possible untoward effects upon the law or its administration of the victory resting upon an unwanted ground, are not pointed out. It means that the decisions of other courts, in point or closely relevant, have not been defended as they perhaps could have been, since neither party has thought or urged that they were wrong. I would, in general, and in this case, take the deliberate concession of a *sui juris* litigant at face value, and decide the case accordingly, unless I was persuaded that somehow I was being imposed upon. And I would regard Government counsel's client as *sui juris*. Of course, the effect as a precedent of a decision made on the basis of a concession would not be great. In the instant case, since I agree with my brethren that the grounds on which the Government asks us to decide the case in its favor are unsound, I would decide for its adversary and permit him to recover.

JONES, *Judge*, took no part in the decision of this case.

UNITED STATES LINES OPERATIONS, INC. v. THE UNITED STATES

[No. 42833. Decided June 7, 1943. Plaintiff's motion for new trial overruled October 4, 1943]

On the Proofs

Transportation charges; discount provided in published tariff rates for round-trip sailings in off-season.—Where under plaintiff's proposal of March 29, 1930, and the Quartermaster General's acceptance of April 9, 1930, it was agreed that plaintiff would provide for the transportation to Europe and return of "Gold Star Mothers and Widows," as provided under Acts of Congress (45 Stat. 1508; 46 Stat. 225), at tariff rates for the accommodations eastbound and westbound; and where plaintiff's published tariff provided for round-trip rates during off-season sailings with a deduction of 12 percent from the combined eastbound and westbound fares for such round-trip sailings; it is *held* that plaintiff is not entitled to recover for the 12 percent deducted by defendant from plaintiff's bills at full tariff rates.

Same.—Since plaintiff agreed to transport the Gold Star Mothers and Widows to and from Europe at tariff rates, and since plaintiff's published tariff provided for the 12 percent deduction; the Government was entitled to the 12 percent deduction from the combined eastbound and westbound fares as published in plaintiff's tariff.

Same; waiver.—The action of plaintiff in waiving its right to charge for the exclusive occupancy of cabins on a capacity basis was purely voluntary, as shown by the evidence, and was not conditioned upon payment at full tariff rates without discount.

Same; equitable estoppel.—Where the Government paid certain vouchers submitted by plaintiff, accompanied by lists of passengers and rates, at full tariff rates, without discount, the Government was not estopped from claiming such discount in final settlement.

Same; Government entitled to rates charged to public.—The rule that the Government is entitled to the same transportation rates and fares which are available to the general public is well settled, and no Government official has the authority to arrange for a rate higher than that available to the public.

Counterclaim; extension of lease by consent.—The rule relating to landlord and tenant is that if a tenant holds over after expiration of a lease for a definite term under circumstances showing tenant's willingness to continue the existing arrangement and if the lessor accepts rent, thus consenting to continued occupancy without indicating that lessor contemplates a change

in terms, the continued relationship is consensual, and the tenant will be regarded as a tenant for another term according to the circumstances of the previous occupancy. *Raymond Commerce Corporation* v. *United States*, 93 C. Cls. 698.

Same; hold-over tenancy on month-to-month basis.—Where plaintiff was a hold-over tenant under an annual contract of lease which expired at midnight on June 6, 1931; and where plaintiff, because of reorganization proceedings to which both plaintiff and defendant were parties, did not sign a renewal lease for another year beginning June 7, 1931, and so advised defendant's representative; it is *held*, on the evidence adduced, that plaintiff thereupon became a month-to-month tenant after June 6, 1931, and was entitled to vacate the premises at the end of any month upon giving 30 days' notice to defendant.

Same; 30-day notice.—Where plaintiff, a month-to-month tenant, did not give 30 days' notice of intention to vacate the premises, defendant is entitled to recover the agreed rental for one month.

Same; balance sheet.—Where a balance sheet prepared by independent auditors contained an exhibit stating that plaintiff's tenancy after June 6, 1931, was continued on a month-to-month basis; and where said balance sheet was accepted and became a part of the reorganization agreement prepared by defendant, the defendant is bound thereby.

The Reporter's statement of the case:

Mr. Wm. I. Denning for the plaintiff. *Mr. Roger Siddall* and *Mr. J. R. Roberts* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In this case plaintiff seeks to recover $76,979.28 deducted and withheld by defendant from charges made by plaintiff in vouchers submitted to defendant for transporting Gold Star Mothers and Widows to Europe and return in 1930. The deduction made by defendant from amounts of certain of the vouchers submitted for tickets east-bound and west-bound issued by plaintiff for the various voyages made, was based upon an agreement made March 29, 1930, between plaintiff and defendant under which plaintiff was to provide cabin accommodations at tariff rates for the accommodations occupied, east-bound and west-bound, and upon a provision of plaintiff's tariff that round-trip rates are made by deducting 12 per centum from combined east- and west-bound fares for trips made during "off-season" sailings.

Defendant has filed a counterclaim in which it seeks to recover from plaintiff, as lessee, the amount of $35,014.80, as rent for certain space in a building owned by the government in New York City, from January 1 to June 6, 1932, inclusive, with interest at 6 per centum per annum until paid. Plaintiff was a hold-over tenant under a written lease which expired on June 6, 1931. Plaintiff vacated the premises in December 1931, and the rent stipulated in the lease which had theretofore expired was paid to defendant to and including December 31, 1931.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, United States Lines Operations, Inc., during all times hereinafter mentioned was and now is a corporation organized under the laws of the State of New York. During and prior to 1930 it operated a passenger and freight steamship line under the trade name of "United States Lines" between the port of New York and ports in Great Britain, France, and Germany, and maintained its principal offices at 45 Broadway, New York City. It also operated during that year a passenger and freight steamship line under the trade name of "American Merchant Line" between the port of New York and ports of Great Britain.

FACTS ON CLAIM MADE IN THE PETITION

2. On March 2, 1929, there was approved an act of Congress "To enable the mothers and widows of the deceased soldiers, sailors, and marines of the American forces now interred in the cemeteries of Europe to make a pilgrimage to these cemeteries." 45 Stat. 1508. The act was amended April 19, 1930, 46 Stat. 225.

The Quartermaster General of the Army, under authority of the Secretary of War, arranged for the pilgrimage authorized by the act and negotiated and contracted with United States Lines for transportation of the pilgrims to and from Europe. These negotiations culminated in a proposal of March 29, 1930, which was accepted April 9, 1930, as hereinafter set forth in finding 17.

3. The act of March 2, 1929 (45 Stat. 1508), authorizing

the Secretary of War to arrange for pilgrimages of Gold Star Mothers and Widows to cemeteries in Europe and their return at the expense of the United States, prescribed that the pilgrimages should be by the shortest practicable route and for the shortest practicable time to be designated by the Secretary of War, and that no mothers or widows should be provided for at government expense in Europe for a longer period than two weeks from the time of disembarkation in Europe to the time of re-embarkation in Europe. The act was amended April 19, 1930 (46 Stat. 225), so as to except from the two weeks limitation at government expense in Europe those cases of illness or other unavoidable cause. Also a new paragraph was added at the end of section 3, providing in part that—

> In carrying into effect the provision of this Act, the Secretary of War is authorized to do all things necessary to accomplish the purpose prescribed, by contract or otherwise, with or without advertising. * * *

The pertinent portions of the act of 1929, as amended, are set forth in Exhibit A to the petition.

Section 3 of the original act directed the Secretary of War to make an investigation for the purpose of determining the (1) total number of mothers and widows entitled to make the pilgrimages; (2) number of such mothers and widows who desired to make the pilgrimages and the number who desired to make the pilgrimages during the calendar year 1930, and (3) probable cost of the pilgrimages to be made. The Secretary of War reported to Congress the results of such investigation, as directed by the act, not later than December 15, 1929.

4. Plaintiff's negotiations regarding the 1930 pilgrimage began with a conference with the Quartermaster General and his staff June 7, 1929, which conference was supplemented by a proposal by plaintiff dated June 19, 1929, to the Quartermaster General offering steamship transportation on vessels of the United States Lines as follows:

> Please let me thank you for the time you gave to Mr. Childress, Mr. Haggerty, and Mr. Hanson of the United States Lines when they discussed the matter of the Gold Star Movement with you on Friday, June 7th.

The United States Lines is particularly anxious to handle this movement and we will do everything possible both here and abroad to cooperate with you in connection with it. We will assign one or more of our representatives to work in conjunction with those you may designate so that the details may be available at the earliest possible date.

Our sailing schedule is not yet prepared for 1930, but we will have weekly Cabin sailings in May, June, July, and August next year when I understand the movement will take place. The capacities of our ships in Cabin Class, which I understand is the type of accommodation provided for in the bill, are as follows:

S. S. *George Washington*	499
S. S. *America*	753
S. S. *Republic*	577
S. S. *President Harding*	322
S. S. *President Roosevelt*	322

While I understand Mr. Hanson advised you, I should like to repeat, that from the standpoint of economy to the government and the proper handling and housing of this party in Europe, it would be much better if their transportation could be provided in what is termed "off-season" when a 10% reduction is available.

These periods are:

Eastbound, August 16th to May 15th.
Westbound, October 16th to July 15th.

If travel is one way in off-season and one way in height of the season, the 10% reduction is applicable on one-half of the fare.

I understand that you expect 3,500 Gold Star Mothers to take advantage of this trip and that they will remain in Europe about two weeks. I concur in the suggestion that we alternate in handling a group of 500 every two weeks out of New York so that the vessel that takes the second contingent from this side will pick up the first group returning and so on until the movement is completed. As you expect to know by December 1st of this year exactly how many will take advantage of this trip, I desire to confirm that we will make tentative reservations for you of 500 berths on each sailing between May 1st and July 15th Eastbound (with the exception of the S. S. *President Harding* and S. S. *President Roosevelt* on which we will reserve 150 berths), and the same number on the ships returning. We will hold this space until the survey indicates just exactly how many will take advantage of the trip, but

I understand you will have this information by December 1st.

We will grant one free ocean ticket for each twenty-five round-trip bookings, not exceeding five on each sailing. The round-trip cabin fares to and from Cherbourg are as follows:

S. S. *George Washington*	$320.00 and up
S. S. *America*	315.00 and up
S. S. *Republic*	300.00 and up
S. S. *President Harding* and S. S. *President Roosevelt*	310.00 and up

While there is at present a debarkation and embarkation charge of $4.00 on Cabin passengers at French ports, it is quite likely that if proper overtures are made by our Government to the French Government, that this tax will be waived and the $5.00 Revenue tax which is exacted on Eastbound tickets. The fares quoted above are the gross fares and if the movement is in "off-season" the 10% reduction can be made.

I have taken the opportunity of asking our Director in Paris to cooperate with Colonel Ellis in the matter of the housing and the transportation facilities to and from the cemeteries so that when a survey from Colonel Ellis is received it will probably give you a better picture of what the ability is to handle the movement during the period from May through to August 15th. As a result of this our representatives can get together and work out further details.

The "round-trip cabin fares," above set forth, appear, so far as the record shows, to have been the combined full-face tariff rates eastbound and westbound.

At the time this proposal was made there was in effect "round-trip fare rates" with a reduction of 10% from the combined one-way fares. Effective January 1, 1930, the reduction was made 12 per centum.

5. In reply to this proposition of the plaintiff, the Quartermaster General wrote plaintiff on June 27, 1930, as follows:

I have given consideration to your letter of June 19th, regarding the handling of the transportation of Gold Star Mothers to Europe in 1930, and I particularly appreciate your offer to cooperate in working out plans for handling this movement. As I advised Mr. Childress, Mr. Hagerty, and Mr. Hanson, when they visited me to discuss this matter, we are not yet in a position to make definite plans or arrangements for the

necessary transportation. However, the matter is being considered and it is hoped that a general line of procedure can be determined in the near future. Definite plans, of course, can not be formulated until the size of the movement is known, which will be about November 15th. When something more definite has been determined, I will be pleased to advise you and to take the matter up with your representatives.

6. Conferences between plaintiff's authorized representatives and the Quartermaster General continued after the Quartermaster's letter to plaintiff of June 27, 1929, as a result of which conferences the Quartermaster General requested United States Lines to submit a new proposal covering ocean transportation of Gold Star Mothers and Widows. This plaintiff did, through the passenger traffic manager, on November 26, 1929, as follows:

In accordance with recent conferences with our Washington General Agent, Mr. John W. Childress, and the writer, relative to the Gold Star Mothers' and Widows' Pilgrimage to Europe, at which time you very kindly requested the United States Lines to submit a proposal covering the ocean transportation of this movement, I have the honor of submitting the following:

1. In order to facilitate the handling of the many details incident to this movement, the United States Lines agrees to set up a special booking organization to be located in the office of the War Department, Washington, D. C., the War Department to provide necessary office accommodations and equipment, etc., for such personnel.

2. While our ships are provided with medical staffs, we will, if desired, provide free transportation, both east-bound and west-bound, for one doctor and one nurse of the War Department on each ship which carries a minimum of seventy-five Gold Star Mothers and Widows.

3. The United States Lines will provide free ocean transportation, both east-bound and west-bound, for one officer on each ship which carries a minimum of seventy-five Gold Star Mothers and Widows, it being understood that such officers will accompany particular groups, both east-bound and west-bound, and act as the War Department representatives for such groups.

4. The United States Lines agrees to provide Cabin accommodations in the number designated opposite each

of the sailings shown on the attached list, these accommodations to be allotted by the War Department to the Gold Star Mothers and Widows at the rate per passenger outlined in the succeeding paragraph. In other words, the assignment of individual berths will be made by the War Department through the office of the United States Lines to be located in the Department, east-bound and west-bound assignments to be made simultaneously. Any space not assigned by the War Department fifteen days prior to east-bound sailings to be available to the United States Lines for sale elsewhere. Should any passengers desire to return on a sailing other than the one for which originally booked, the United States Lines will, upon approval of the officer so designated by the War Department, provide equivalent Accommodations on a subsequent sailing selected on which such accommodations are available at the time of application.

5. The United States Lines agree to provide the ocean transportation and steamship accommodations outlined at the round trip rate of $350.00 per passenger, this rate exclusive of all other charges such as revenue tax, French Port Tax, etc. The payment in full of such transportation and accommodations to be remitted by the War Department to the United States Lines through the booking office provided at the time tickets are issued, which, as outlined above, shall not be less than fifteen days prior to contemplated eastbound sailing. Insofar as incidental expenses aboard ship are concerned, such as gratuities to stewards, charge for deck chairs, steamer rugs, etc., arrangements can be made to have the Pursers on the ship deal directly with your representatives covering each group. It has been suggested that the figure of $12.00 per person each direction, or a total of $24.00 per person, would cover all such items.

6. Cabin vessels of the United States Lines sail from Pier 4, Hoboken, New Jersey. The United States Lines maintains a bus service between certain centralized points in New York City and Pier 4, Hoboken, which service would be available to the Gold Star Mothers and Widows at the customary charge of $1.00 per person, each direction. This charge also covers the transportation of hand baggage. If considered advisable, we would agree to extend this service to other centralized points in New York City to be agreed upon.

In order to provide accommodations for this movement, as outlined in the attached list, it will be necessary to arrange a special schedule, and I am sure the War De-

partment fully appreciates that this would not be practicable if the entire movement were handled in a manner other than as proposed.

It is believed that the foregoing covers the essential points to be definitely settled prior to drawing up a formal agreement.

I would like to add that this organization will be at your disposal for assistance in connection with any matters arising aside from ocean transportation. I have in mind that our Paris and London offices can be of great assistance in facilitating the actual transfer of the members of this movement to the various hotels and cemeteries, and they will cooperate in every way possible.

In conclusion, I would like to again assure you that you may count on the fullest cooperation of our entire organization, and any suggestions from you at any time as to how we might render additional assistance will receive immediate attention. The United States Lines is most desirous of doing everything possible looking toward the successful handling of this sacred pilgrimage, and is very confident that the wishes of the Government will be handled in a manner which will redown [*sic*] to the honor and credit of all concerned.

The schedule of sailings mentioned in this proposal, following item 6, consisted of 18 sailings eastbound to Europe of the vessels listed, beginning May 7 and ending August 30, 1930, providing from 5400 to 5700 cabin berths, to arrive at Cherbourg from May 16 to September 9, 1930, and the same number of sailings of the same vessels from Cherbourg to New York over the period May 29 to September 22, 1930, and arriving at New York from June 6 to October 2, 1930.

7. The report of the War Department made to Congress under the act of March 2, 1929, and the testimony of the Assistant Quartermaster General before the appropriations committee set forth that, on the basis of information then before the War Department, the pilgrimage would be unusual in character, requiring infinite detail, because of advanced age and pecuniary status of many of the mothers and widows who had expressed a desire to make the pilgrimage. It was shown that the average age of the pilgrims was 61.

The oldest woman who had expressed the desire to make the pilgrimage was 88 years old. Colonel Gibson read into the record of the hearings before the Committee on Appro-

priations the following memorandum furnished him by the Surgeon General of the United States Public Health Service:

As estimated in the previous memorandum, it is believed that the average age of the members of the Pilgrimage will be about 65, and that the majority of them will be in the 65 to 70-year age group. Women of this age usually receive considerable assistance and care from the members of their families, when they are in their normal state of health at home. Definite figures for morbidity in this age group are not available. They are, however, available for the age group 60 to 61, in which group it is expected that 190 pilgrims would be taken sick had they remained at home during the 40 days of pilgrimage, the average time that each individual will be away from home. * * *

Although, as stated, accurate experience figures are not available, it is believed that the number of sick days will approximate 8,800, and since the insurance companies figure the rates for this age group at double the actual expectancy in order to provide a margin of safety, these figures should be doubled. The figures quoted are the expected morbidity had the pilgrims remained at home, and the influence that the change in the even tenor of their lives will have on their health is, of course, somewhat a matter of speculation but it is believed that it is safe to assume that the morbidity rates will be higher as a result of the change in their habits and environment.

8. After the report to Congress, as above stated, negotiations between plaintiff and the Quartermaster General continued, as a result of which a new proposal was submitted by the United States Lines by its passenger traffic manager on March 10, 1930, as follows:

In accordance with conference held at your office on Wednesday, March 5th, with reference to the Gold Star Mothers' and Widows' Pilgrimage, I give you herewith an outline of the salient points agreed upon at that meeting.

1. We agree to provide Cabin accommodations in the number and on the vessels indicated on the attached list at Tariff rates for the accommodations occupied east- and west-bound. We understand that all incidental charges, such as revenue tax, port tax, head tax, will be waived by the United States and French Governments.

2. Payment for transportation to be made by your

Disbursing Officer for the number booked for each east- and west-bound sailing in accordance with vouchers presented by our Washington representative not later than fourteen (14) days prior to eastbound sailing.

3. Payment for tips, deck chairs, rug hire, etc., for these Mothers and Widows on board ship will be in accordance with custom, and as follows, each way:

Bedroom Steward	$3
Dining Room Steward	3
Stewardess	3
Deck chair	1
Rug	1
Deck Steward	1

We understand your Officer on board each of our ships will accept these charges and make the necessary disbursement to our Purser at the end of each voyage. The Purser will submit to your Officer a proper payroll receipted by each employee on the ship to whom the money was distributed, and also bills for deck chair and rug hire. The above disbursements will total $12. per person each way.

4. Six (6) weeks before each eastbound sailing, an accurate survey will be made to determine the progress of such sailing and your representative will advise us the definite number that will be carried. The balance of space on the east- and west-bound ships will be automatically released to us for sale.

5. On March 15th you will definitely advise us of the number that will sail on the S. S. *America* May 7th; on April 1st you will advise us of the number sailing on the S. S. *President Harding* on May 14th.

6. Your representatives will assign the accommodations to these women and our representatives will issue tickets in accordance with your assignments.

7. The Medical Staff on our ships carrying the Gold Star Mothers and Widows will provide any medical service required.

8. To facilitate the proper handling of the many details incident to this Movement, the United States Lines agree to arrange a special booking department in the War Department office at Washington, with the understanding that you will provide the necessary office accommodations, equipment, etc., for three of our personnel, and also provide without charge the services of a stenographer as required.

9. All steamship tickets for these Mothers and Widows will be issued in Washington and show steamship trans-

portation only. We understand a special passport will be issued for those authorized to make this Pilgrimage.

10. We understand that you will assign an officer designated to act as Contact Representative on board each vessel east and westbound. We agree to provide suitable accommodations for such officer, which will afford them an opportunity to confer with the Gold Star Mothers and Widows while en route to and from Europe.

11. We understand you furnish and keep at all times three caskets on each of our ships east and westbound carrying Gold Star Mothers and Widows in anticipation of probable mortality amongst these Mothers and Widows; any unused caskets to be returned to you when the Movement is completed.

12. We agree to furnish bus service between certain centralized points in New York City and to and from Pier 4, Hoboken, N. J. (the point from which our vessels depart and arrive), for all passengers included in this movement, at the customary charge of $1.00 per person each way. This includes cost of transportation of hand baggage. We agree upon request to extend this service to those hotels in New York City which may be designated by you as points-of-call.

We understand that account for this bus transportation will be certified by your New York Representative and paid by the Army Disbursing Officer at New York City.

13. In conclusion, permit me to assure you that you can depend upon our organization to render the fullest cooperation. We will welcome suggestions from you at any time which may tend to make our service more satisfactory. We want you to feel that we are exceedingly anxious to do everything possible in order to fulfill the purpose of this Pilgrimage.

Thanking you for your co-operation, and awaiting your acceptance of the above proposal, I am,

The list of vessels and sailings attached to this proposal was the same as hereinbefore mentioned, and the number of cabin berths specified in the list eastbound and westbound was 4,925.

9. The proof does not show that at conferences which resulted in the above-quoted proposal of plaintiff, or at any prior conferences, there was had any understanding or agreement with reference to the meaning of the provision in item 1 of the proposal of March 10 to provide "cabin ac-

commodations at tariff rates for the accommodations occupied east- and west-bound," other than as had been stated by plaintiff in the June 19, 1929, proposal and provided by the terms and conditions of the tariff of the United States Lines in effect on March 10, 1930.

10. As a further result of conferences which culminated in plaintiff's proposal of March 10, 1930, and in order to provide for transportation for separate groups of colored mothers and widows, as contemplated by paragraph 4 (a) (e) of the promulgated regulations by the Secretary of War of January 18, 1930, plaintiff submitted to the Quartermaster General a separate proposal on March 15, 1930, for their sea transportation on a vessel of the American Merchant Line, or on the S. S. *Republic*. This proposal was as follows:

> In view of the extenuating circumstances surrounding the carrying of the Colored Gold Star Mothers and Widows, I am submitting herewith, for your approval, separate proposals.
>
> The first is based on using a ship of the American Merchant Line for two or three trips, while the second is based on the use of the S. S. *Republic*, sailing east-bound on August 30th to Cherbourg and returning from Cherbourg on September 22nd, arriving at New York on October 2nd.
>
> The utilization of the American Merchant ship has its distinct advantages:
>
> 1. The Colored Contingent will occupy this vessel exclusively.
>
> 2. The rate per passenger is considerably lower than would be charged on any other basis.
>
> 3. We can sail this vessel, if need be, during the months of June, July, and August, providing, of course, the number of Colored Mothers and Widows reach the anticipated figure of two hundred and fifteen (215). This will avoid the chartering of one of our large cabin vessels for the entire movement.
>
> In connection with the chartering of the S. S. *Republic* you will, of course, observe that the figure is much higher than that quoted for the American Merchant ship, but I am sure you will appreciate all the circumstances that had to be taken into consideration by us.
>
> 1. A charter of the ship for their exclusive use for the

period August 30th to October 2nd would prevent us from placing any passengers on this vessel in any class, both east- and west-bound. It is necessary for me to state here that on the corresponding west-bound sailing last year, this vessel carried over eighteen hundred and fifty (1,850) passengers, and, of course, if chartered by the War Department for the exclusive use of the colored group, we would lose this revenue.

2. In addition to the actual passenger revenue for the corresponding sailing in 1929, we would have to figure the extra time this ship must remain in Europe and estimate the loss of goodwill that has been built up over a period of years in favor of this ship—the *Republic*—of approximately $200,000.00.

We must include in this, the fact that we have arranged to run five (5) cruises with the S. S. *Republic* from Philadelphia next year. The success of the cruises this year on this particular vessel was amazing!

I am sure you will consider the above-quoted figure a fair criterion of the value of appreciation and goodwill. It will be necessary to bear in mind the fact that we are definitely committed for the operation of these cruises.

We would have to purchase new linens, equipment, and appurtenances and advertise this fact; in other words, we would have to recondition this vessel, if we ever expected to book regular cabin passengers on this ship.

These considerations are most important in arriving at an estimate that would justify us in placing the *Republic* at your exclusive use, for the period August 30th to October 2nd.

I am giving you the above summary in order to appraise [*sic*] you of the points considered by us in making the attached proposals.

The details, rates, etc., which were attached to the above-quoted proposal, are not in evidence.

11. March 18, 1930, the Quartermaster General by Colonel W. R. Gibson, Assistant Quartermaster General, replied to the above-quoted proposal of plaintiff of March 15, as follows:

Receipt is acknowledged of your letters of March 10th and 15th making certain propositions for the handling of the ocean transportation of the Gold Star Mothers' and Widows' Pilgrimage, separate propositions being submitted for white and colored pilgrimages.

Insofar as the white pilgrimage is concerned, the rates outlined in your letter of March 10th (except that for payment of transportation shown in paragraph 2 of your letter), can be accepted by this office. Paragraph 2 is not satisfactory. Payment for transportation should be made in the usual manner, i. e., a transportation request will be furnished your representative, at the time tickets are obtained, for the number of tickets furnished and the settlement can then be made in the same manner as other transportation requests are now handled, i. e., through the finance officer, Washington, D. C. Should any of the pilgrims, through illness or otherwise, fail to sail on the ship on which they are scheduled and for which tickets have been obtained, a readjustment based on the number actually sailing will, of course, be expected.

With reference to the colored contingent, proposal No. 1 of the letter of March 15th, namely that the War Department charter the S. S. *Republic* for the round trip at a charter price of $422,856 cannot be considered. Proposal No. 2 may possibly meet conditions, but the rates quoted in paragraph 2 thereof are exorbitant. As has been previously explained to you, no official of the Government has the authority to enter into any contract which would commit the Government to the payment of higher rates than those charged the general public. The rates on the ships of the American Merchant Line range from $100 to $140 per berth during the summer season with an average for all berths of $237 for the round trip. If these boats are used, the rate paid should not be in excess of regular tariff rate for the accommodations used. The same objections is also made to paragraph 3 as is shown above to paragraph 2 of your letter of March 10th. It is believed that two sailings of the S. S. *American Merchant* will be sufficient to handle the colored pilgrims. On this assumption, passage would not be required on the June sailing of the *American Merchant* and the suggested sailings on July 12th and August 16th would be satisfactory to this office.

With reference to furnishing bus service between centralized points in New York City and pier No. 4 at Hoboken it has been decided to leave this matter to Colonel A. E. Williams, QMC, who will be in charge of the New York office and it is suggested that you take this matter up with him.

I would appreciate having your further views on this subject at an early date.

For the quartermaster General:

12. Accordingly, on March 19, 1930, the United States Lines, by its passenger traffic manager, wrote the Quartermaster General as follows:

> We have, for acknowledgment, letter from Colonel W. R. Gibson, dated March 18th, with reference to the handling of ocean transportation for the Gold Star Mothers' and Widows' Pilgrimage.
>
> We have given due consideration to the suggestions contained in above letter of reference and are, accordingly, submiting attached the following:
>
> 1. Amendment to our original proposal with reference to the carrying of the White Mothers and Widows.
>
> 2. New Proposal with reference to the carrying of the Colored Mothers and Widows.
>
> It is believed that we now have reached a definite and clear understanding concerning the handling of these groups and, therefore, request that this amendment and new proposal be accepted by you, if in accordance with your views on the matter.
>
> If there is any point or controversy, we will be pleased, indeed, to have an expression from you concerning same.
>
> We deeply appreciate the dispatch with which our proposals were acknowledged, and understand the reasonableness of the suggestions made by you.

13. The amendment mentioned in item 1, above, of plaintiff's proposal of March 10 consisted of a new paragraph 2, as follows:

> In accordance with suggestions contained in your letter of March 18th, the following amendment is submitted for your approval:
>
> 1. Paragraph 2 to read:
>
> "We understand payment for transportation will be made by United States Government Transportation order to be issued when east- and west-bound tickets for each sailing are made up by our representatives and turned over to your representative. This is the same procedure adopted by the Government in handling transportation requests for regular Government business, if through illness, or any other cause, after ticket has actually been issued, a Gold Star Mother or Widow does not sail on the ship scheduled for her departure, a readjustment, based on the number of passengers actually embarked, will be made."
>
> * * * * *

This amendment is quoted in accordance with suggestions made by you and we think you will agree that this is the very best evidence of our desire to cooperate with you in every possible way.

14. The new proposal submitted March 19 for carrying colored mothers and widows was as follows:

In accordance with the suggestions contained in your letter of the 18th inst., we submit herewith, a new proposal for the handling of the COLORED Gold Star Mothers & Widows on a vessel of the American Merchant Line:

1. We propose to sail a vessel of the American Merchant Line from New York on Saturday, July 12th, arriving at Cherbourg July 21st, and sail the same vessel back from Cherbourg August 3rd, arriving at New York on August 12th. We also propose to sail this same vessel from New York on August 16th, arriving at Cherbourg on August 25th, and sail this same vessel from Cherbourg on September 7th, arriving at New York on September 16th.

2. The rate per passenger, round-trip, will be tariff rate, applicable both east-bound and west-bound on the accommodations actually assigned. We understand that all incidental charges, such as revenue tax, port tax, and head tax, will be waived by the United States and French Governments.

3. We understand payment for transportation will be made by United States Government. Transportation order to be issued when east- and west-bound tickets for each sailing are made up by our representatives and turned over to your representatives. This is the same procedure adopted by the Government in handling transportation requests for regular Government business. If, through illness, or any other cause, after ticket has actually been issued, a Colored Gold Star Mother or Widow does not sail on the ship scheduled for her departure, a readjustment, based on the number of passengers actually embarked will be made.

4. We will charge you the actual demurrage which will accrue for retaining this vessel at Hamburg for an additional seven days on each voyage in order to bring these Colored Gold Star Mothers and Widows back on the ship from the Port of Cherbourg. The demurrage cost per day will be $1,383.00 for 7 days on each of the two trips, or a total of $19,362.00 for 14 days.

5. Payment for tips, deck chairs, rug hire, etc., for these Colored Mothers & Widows on board ship will be in accordance with custom, and as follows, each way:

Bedroom Steward	$3.00
Dining Room Steward	3.00
Stewardess	3.00
Deck Chair	1.00
Rug	1.00
Deck Steward	1.00

We understand your Officer on board ship will accept these charges and make the necessary disbursement to our Purser at the end of each voyage. The Purser will submit to your Officer a proper pay roll receipted by each employee on the ship to whom the money was distributed, and also bills for deck chair and rug hire. The above disbursements will total $12.00 per person each way.

6. Six (6) weeks before each east-bound sailing, an accurate survey will be made to determine the progress of such sailing and your representative will advise us the definite number that will be carried. The balance of space on the east- and west-bound ships will be automatically released to us for sale.

7. Your representatives will assign the accommodations to these women and our representatives will issue tickets in accordance with your assignments.

8. The Medical Staff on board ship carrying Colored Gold Star Mothers & Widows will provide any medical service required.

9. The personnel which we have already placed on the War Department will handle the details in connection with the booking of this group.

10. All steamship tickets for these Mothers & Widows will be issued in Washington and show steamship transportation only. We understand a special passport will be issued for those authorized to make this Pilgrimage.

11. We understand that you will assign an officer designated to act as Contact Representative on board ship. We agree to provide suitable accommodations for such officer, which will afford him an opportunity to confer with the Colored Gold Star Mothers & Widows while en route to and from Europe.

12. We understand you will furnish and keep at all times a sufficient number of caskets on board ship carrying Colored Gold Star Mothers & Widows, in anticipation of probable mortality amongst these Mothers & Widows; any unused caskets to be returned to you when the Movement is completed.

It is our opinion that this is a most practical and feasible solution for the handling of the Colored Contingent. We have changed our original proposal in accordance with your ideas on the matter, and we believe this proposal is evidence of our desire to cooperate to the greatest possible degree for the successful termination of this enterprise.

We thank you for your cooperation, and await your acceptance of this proposal.

The tariff for the American Merchant Line did not provide for a reduction in the combined one-way tariff rates for "off-season" travel.

15. March 27, 1930, the Quartermaster General by his assistant, Colonel Gibson, wrote plaintiff as follows:

Your letter of March 19, 1930, submitting proposal for the handling of ocean transportation for the colored Gold Star Mothers and Widows is satisfactory, except insofar as pertains to item 4—demurrage.

It is noted that you desire to charge a demurrage cost of $1,383 for seven days on each of the two trips. This amount appears to this office to be entirely too much. Sisterships of the American Merchant are being operated under the jurisdiction of the Quartermaster General in the transport service. Due to the large number of cabin passengers and troops the crew is considerably in excess of that required for the American Merchant, the transports carrying a total crew of one hundred thirty-three. In spite of this fact the average cost per day for these boats, while in port (without adding any amount for repairs), is $521.60. The Shipping Board's satistics on "B" type vessels show that the average cost per port day is $495.82. These figures include a prorated cost for stores, supplies, repairs, and insurance.

In view of the above facts, it is our opinion that the charge for demurrage should be reduced to actual cost.

16. On the following day, March 28, 1930, Colonel Gibson, for the Quartermaster General, wrote plaintiff as follows:

The proposal for handling of ocean transportation for white mothers and widows of the Gold Star Mothers and Widows Pilgrimage to Europe, contained in your letter of March 10, 1930, as amended by your letter of March 19, 1930, is acceptable, but it will be appreciated if these two letters are combined in order that this office may have one letter on which to base acceptance.

17. Accordingly, the final combined proposal of plaintiff dated March 29, 1930, was submitted to the Quartermaster General covering the handling of ocean transportation for both white and colored pilgrims, as follows:

> In accordance with conference held at your office on Wednesday, March 5th, with reference to the Gold Star Mothers and Widows Pilgrimage to Europe and the subsequent discussions in connection with this, we are presenting herewith proposals which provide for the carrying of both the white and colored Gold Star Mothers and Widows in ships of the United States Lines and the American Merchant Line.
>
> PROPOSAL WITH REFERENCE TO CARRYING WHITE MOTHERS AND WIDOWS
>
> 1. We agree to provide Cabin accommodations in the number and on the vessels indicated on the attached list at tariff rates for the accommodations occupied east- and west-bound. We understand that all incidental charges, such as Revenue Tax, Port Tax, Head Tax, will be waived by the United States and French Governments.
>
> 2. We understand payment for transportation will be made by United States Government Transportation order to be issued when east- and west-bound tickets for each sailing are made up by our representatives and turned over to your representative. This is the same procedure adopted by the Government in handling transportation requests for regular Government business. If, through illness, or any other cause, after ticket has actually been issued, a Gold Star Mother or Widow does not sail on the ship scheduled for her departure, a readjustment, based on the number of passengers actually embarked will be made.
>
> 3. Payment for tips, deck chairs, rug hire, etc., for these Mothers and Widows on board ship will be in accordance with custom, and as follows, each way:

Bedroom Steward	$3
Dining Room Steward	3
Stewardess	3
Deck Chair	1
Rug	1
Deck Steward	1

> We understand your Officer on board each of our ships will accept these charges and make the necessary disbursement to our Purser at the end of each voyage. The Purser will submit to your Officer a proper pay roll receipted by each employee on the ship to whom the money

was distributed, and also bills for deck chair and rug hire. The above disbursement will total $12 per person each way.

4. Six (6) weeks before each east-bound sailing an accurate survey will be made to determine the progress of such sailing and your representative will advise us the definite number that will be carried. The balance of space on the east- and west-bound ships will be automatically released to us for sale.

5. On March 15th you will definitely advise us of the number that will sail on the S. S. *America* May 7th; on April 1st you will advise us of the number sailing on the S. S. *President Harding* on May 14th.

6. Your representatives will assign the accommodations to these women and our representatives will issue tickets in accordance with your assignments.

7. The Medical Staff on our ships carrying the Gold Star Mothers and Widows will provide any medical service required.

8. To facilitate the proper handling of the many details incident to this Movement, the United States Lines agree to arrange a special booking department in the War Department office at Washington, with the understanding that you will provide the necessary office accommodations, equipment, etc., for three of our personnel, and also provide, without charge, the services of a stenographer as required.

9. All steamship tickets for these Mothers and Widows will be issued in Washington and show steamship transportation only. We understand a special passport will be issued for those authorized to make this Pilgrimage.

10. We understand that you will assign an Officer designated to act as Contact Representative on board each vessel east- and west-bound. We agree to provide suitable accommodations for such officers, which will afford them an opportunity to confer with the Gold Star Mothers and Widows while en route to and from Europe.

11. We understand you will furnish and keep at all times three caskets on each of our ships east- and west-bound carrying Gold Star Mothers and Widows in anticipation of probable mortality amongst these Mothers and Widows; any unused caskets to be returned to you when the Movement is completed.

PROPOSAL TO CARRY COLORED GOLD STAR MOTHERS AND WIDOWS.

We propose to sail a vessel of the American Merchant Line from New York on Saturday, July 12th, arriving

at Cherbourg, July 21st, which will carry 80 passengers, and sail the same vessel back from Cherbourg August 3, arriving in New York August 12. We also propose to sail this same vessel from New York on August 16, arriving at Cherbourg on August 25th; sail this same vessel on September 7th, arriving at New York on September 16. Each of these sailings to accommodate 80 colored Gold Star Mothers and Widows.

1. The rate per passenger, round-trip, will be tariff rate, applicable both east-bound and west-bound on the accommodations, actually assigned. We understand that all incidental charges, such as revenue tax, port tax and head tax, will be waived by the United States and French Governments.

2. We understand payment for transportation will be made by the United States Government. Transportation order will be issued when east- and west-bound tickets for each sailing are made up by our representatives and turned over to your representative. This is the same procedure adopted by the Government in handling transportation requests for regular Government business. If, through illness, or any other cause, after ticket has actually been issued, a Colored Gold Star Mother or Widow does not sail on the ship scheduled for her departure, a readjustment, based on the number of passengers actually embarked will be made.

3. We will charge you the actual demurrage which will accrue for retaining this vessel at Hamburg for an additional seven days on each voyage in order to bring these Colored [Gold] Star Mothers and Widows back on the ship from the Port of Cherbourg. The demurrage cost per day will be $1,383.00, and the details of this charge as follows:

	Per day
Wages	$260.00
Food (Crew)	60.00
Stores—Equipment	65.00
Fuel	45.00
Water	10.00
Wharfage	300.00
Insurance	60.00
Sundry	25.00
Miscellaneous	30.00
Overhead Depreciation Fixed Charges	528.00
Total	1,383.00

4. Payment for tips, deck chairs, rug hire, etc., for these Colored Mothers and Widows on board ship will be in accordance with custom, and as follows, each way:

Bedroom Steward	$3.00
Dining Room Steward	3.00
Stewardess	3.00
Deck Chair	1.00
Rug	1.00
Deck Steward	1.00

We understand your Officer on board ship will accept these charges and make the necessary disbursement to our Purser at the end of each voyage. The Purser will submit to your Officer a proper pay roll receipted by each employee on the ship to whom the money was distributed, and also bills for deck chair and rug hire. The above disbursements will total $12.00 per person each way.

5. Six (6) weeks before each east-bound sailing, an accurate survey will be made to determine the progress of such sailing and your representative will advise us the definite number that will be carried. The balance of space on the east- and west-bound ships will be automatically released to us for sale.

6. Your representatives will assign the accommodations to these women and our representatives will issue tickets in accordance with your assignments.

7. The Medical Staff on board ship carrying Colored Gold Star Mothers and Widows will provide any medical service required.

8. The Personnel which we have already placed in the War Department will handle the details in connection with the booking of this group.

9. All steamship tickets for these Mothers and Widows will be issued in Washington and show steamship transportation only. We understand a special passport will be issued for those authorized to make this Pilgrimage.

10. We understand that you will assign an officer designated to act as Contact Representative on board ship. We agree to provide suitable accommodations for such officer, which will afford him an opportunity to confer with the Colored Gold Star Mothers and Widows while en route to and from Europe.

11. We understand you will furnish and keep at all times a sufficient number of caskets on board ship carrying Colored Gold Star Mothers and Widows, in anticipation of probable mortality amongst these Mothers and Widows; any unused caskets to be returned to you when the movement is completed.

You will observe that we have changed our proposals in accordance with your suggested ideas on the matter and we believe that this combined proposal is conclusive evidence of our desire to cooperate to the highest possible degree to the successful termination of this enterprise.

We wish to thank you sincerely for your cooperation and await your definite advice concerning the acceptance of this proposal.

18. This proposal was accepted by the Quartermaster General April 9, 1930, in terms as follows:

> Receipt is acknowledged of your letter of March 29, 1930, enclosing the combined proposal covering the handling of ocean transportation of both the white and colored mothers and widows, which is accepted on behalf of the War Department.

19. Payment for transportation of white mothers and widows only is involved in this suit.

Due to the limitation of two weeks for the tour in Europe certain of plaintiff's schedules of sailings had to be and were changed and adjusted.

20. From time to time prior to each sailing, defendant furnished plaintiff a preliminary list of the pilgrims for the respective sailings. On these preliminary lists there were indicated the name of the vessel, date of sailing, cemetery group, names and addresses of passengers with the designation "M" or "W" for mother or widow, and the location of graves in the particular cemetery group, such as Meuse-Argonne, Oise, Oise-Aisne, Aisne-Marne, etc. Thereafter plaintiff advised defendant of allotments of space held on each sailing, which were based upon estimates furnished by defendant of the number of passengers for each sailing. These allotments were reduced or increased by plaintiff to accord with defendant's daily or weekly estimates. Space was finally assigned in accordance with the number of mothers and widows who were actually sailing on a vessel. Plaintiff issued separate east- and west-bound tickets for each berth, or portion of a stateroom, accommodation for each person sailing on a particular voyage. The tickets for the east-bound voyage were retained by plaintiff, and the tickets for the west-bound voyage were turned over to defendant's

contact officer who accompanied the pilgrims. The Quartermaster General then issued a separate transportation request for each sailing, one for the east-bound voyage and one for the west-bound voyage, for the total number of cabin-class berths desired on a particular sailing. Each transportation request gave the name of the pilgrim heading the list and the number of others sailing.

The first transportation request issued to plaintiff May 7, 1930, for the first east-bound voyage, which was typical of all others, was in the name of Mrs. Mary Kessler and 232 others. The government transportation request for the tickets for the return, or west-bound voyage, of this same group was issued and delivered to plaintiff at the same time as the issuance and delivery of the transportation request for the east-bound tickets. The same practice was followed as to all other east-bound sailings. Payments for the east-bound and west-bound tickets were usually paid by the War Department Finance officer's office the day following issuance of the transportation requests and tickets on vouchers on Government Standard Form prepared and submitted by plaintiff. The procedure in the issuance of tickets at the same time for the west-bound return of the same party of pilgrims and the submission of vouchers was precisely the same as for the east-bound. Plaintiff issued tickets and submitted bills for the west-bound passage on the same day the east-bound tickets were issued and presented for payment.

21. There were seventeen parties of white pilgrims transported to and from Europe in 1930, commencing with the first party sailing east-bound May 7 and ending with the seventeenth party returning west-bound to New York on October 2. The first party of pilgrims sailed on the S. S. *America*, east-bound, May 7, and returned, west-bound, on the *President Harding* May 29; the second party of pilgrims sailed on the S. S. *Republic*, east-bound, May 13, and returned, west-bound, on the S. S. *Republic* sailing June 4 and the S. S. *George Washington* sailing June 5, respectively. The first and second parties traveled east-bound in the high season and returned west-bound in the off-season, and the eleventh to seventeenth parties traveled east-bound in the off-season and returned west-bound in the high season.

22. After two sailings had taken place under the foregoing arrangements, the War Department found it desirable, due to the advanced age of many of the pilgrims, to allow all pilgrims lower berths in cabins, and not to assign upper berths to any of them. In furtherance of this change in policy, negotiations were had between the parties resulting in the following exchange of communications on the dates indicated:

UNITED STATES LINES,
PASSENGER DEPARTMENT,
1027 Connecticut Ave.,
Washington, D. C., May 26, 1930.

COLONEL W. R. GIBSON,
War Department, Washington, D. C.

DEAR COLONEL GIBSON: In order to clarify the understanding arrived [at] at the recent conference between General DeWitt, yourself, Captain Shannon, and representatives of our company, it is suggested that this understanding be confirmed in writing.

At the conference General DeWitt stated that he was willing to pay us capacity for the rooms assigned to the Gold Star Mothers and Widows regardless of the actual number of passengers placed in them. This decision was based upon the necessity for providing lower berths for Gold Star Pilgrims. As you will recall we pointed out that a stop order has been placed on each sailing carrying Gold Star Mothers and Widows in order that every possible lower berth procurable would be assigned to our office in the War Department to care for your needs.

The rule of our company on all high season sailings makes it imperative for us on regular sailings to book rooms to capacity. In other words a four-berth room is occupied by four passengers and a three-berth room by three passengers. In an effort to show our desire to cooperate with the War Department the officials of our company have decided to charge only three in the room rate where three people occupy a four-berth room. This decision, of course, means that we will lose the balance of the revenue we would otherwise accrue had we booked four passengers in the room. They have also decided to charge the two in the room fare where two Mothers or Widows occupy a three- or a four-berth room. This is a material concession as you will observe and means a substantial loss of revenue particularly

on high season sailings. It is contemplated that in order to fulfill the requirements of General DeWitt, it will be necessary for us to issue tickets on the above basis, and to avoid any misunderstanding at a later date we will greatly appreciate your supplementing our agreement by letter advising that this agreement is entirely satisfactory to the War Department.

Very truly yours,

JOHN J. HAGERTY,
General Field Agent.

23. The "recent conference" referred to in the above letter was held with General DeWitt, Quartermaster General, May 15, 1930, and at that conference General DeWitt stated to plaintiff that he desired the maximum possible number of lower berths be assigned to widows and mothers; that the handling of this enterprise was not a question of money but one of satisfactory accommodations being furnished, and that, if necessary, he was willing to pay full fare capacity for each room, even if four-berth rooms were occupied by only two mothers.

24. Upon receipt of plaintiff's letter of May 26, the Quartermaster General replied as follows:

JUNE 4, 1930.

UNITED STATES LINES,
1027 Connecticut Avenue, Washington, D. C.

GENTLEMEN: With reference to your letter of May 26, 1930, this will confirm the understanding reached at the recent conference in this office in reference to steamship accommodations for Mothers and Widows making the pilgrimage to American cemeteries in Europe, in which you were advised that every possible lower berth procurable should be assigned to this office to care for these pilgrims, that upper berths should not be used if at all possible to avoid it. The War Department does not desire any other travelers placed in these rooms with the pilgrims (except where relatives are traveling with them). The War Department will pay the tariff rates for exclusive occupancy of these rooms for the number of persons assigned thereto.

Very truly yours,

J. L. DEWITT,
Major General,
The Quartermaster General.

25. The "tariff rates" referred to in the accepted proposal of March 29, 1930, were published by United States Lines in a folder dated January 1, 1930, which is in evidence and made part hereof by reference thereto.

This folder quoted winter or "off-season" rates effective eastbound July 16 to May 15, inclusive, and westbound October 1 to July 31, inclusive, and summer or "high-season" rates effective eastbound May 16 to July 15, inclusive, and westbound August 1 to September 30, inclusive. The off-season rates set forth on the tariff were lower than the high-season rates. As to off-season rates the folder provided:

> Round trip rates apply during "off-season"—Eastbound, July 16th to May 15th, inclusive; Westbound, Oct. 1st to July 31st, inclusive. Round trip rates for berths above, minimum is made by deducting 12% from combined Eastbound and Westbound fares.

The rates were indicated as applying to the individual passenger and were shown as two in room, three in room, four in room, or berth rate, depending upon the identity of the room and the season.

The folder also provided:

> The right is reserved to decline the sale of any room at less than capacity Eastbound May 15th to July 15th, inclusive, and Westbound August 10 to September 15th, inclusive.

26. The plaintiff was a member of the Trans-Atlantic Passenger Conference, and minutes of the meetings of the Conference as filed in the Department of Commerce Shipping Board Bureau, made a part hereof by reference, were, so far as here material, as follows:

> *Minutes of Meeting No. 4, March 28, 1929*
>
> 26. CABIN AND SECOND CLASS ROUND TRIP RATES (ALSO GRADES 9 AND 10 FIRST CLASS).
>
> It is noted, for record, that effective March 25, 1929, the continental-North Atlantic Group instituted, as a trial, Cabin and Second Class (also Grades 9 and 10 First Class) round-trip rates with a reduction of 10% from the combined one-way fares for travel during the under-noted periods:
>
> Eastbound—August 16 to May 15.
> Westbound—October 16 to July 15.
>
> * * * * *

(a) If round-trip ticket is issued at the outset and passenger travels one way during the off season and one way during the summer season, the reduction of 10% will be allowed on the off season one-way fare.

* * * * *

(f) A Line may advertise that the reduction will be allowed on the off season one-way fare, even if the passenger travels one way during the summer season.

Minutes of Meeting No. 10, May 15, 1929

68. CABIN AND SECOND CLASS ROUND TRIP RATES (ALSO GRADES 9 & 10 FIRST CLASS)—Ref. Min. 26, noted *it has been agreed* that in order to obtain the agreed 10% reduction, "round trip tickets must be purchased at the outset."

Minutes of Meeting No. 24, November 22, 1929

174. RATE SITUATION. * * *

(d) *Cabin (and Grades 9 and 10 First Class) Off-season Round Trip Rates* (P. C. Min. 26, 49, 68, 97, 138) —it is noted for record that, effective January 1, 1930, the Cabin (and Grades 9 and 10 First Class) off-season round trip rates, British and Continental Ports, will be as per Annex No. 5, attached hereto.

* * * * *

Minutes of meeting No. 24, November 22, 1929

175. SEASONAL PERIODS AND RATES—It is noted for record that seasonal periods and the rates applicable thereto are as follows:

* * * * *

(c) *Cabin (Also Grades 9 & 10 First Class) and Second Class Round Trip Rates*: *(P. C. MIN. 26)*.

Off Season *12% off combined one-way rates*		*Summer Season* *no reduction*	
Westbound	Eastbound	Westbound	Eastbound
October to July	July 16 to May 15	August September	May 16 to July 15

27. Service covered by the foregoing proposals and acceptances was performed, and bills rendered therefor were presented by plaintiff to defendant. Many rooms were not filled by defendant to capacity and in all such instances the defendant in accordance with plaintiff's accepted proposal of May 26, 1930, required the exclusion of all travelers not connected with the pilgrimage. The bills were stated without discount on off-season travel, and, in accordance with plain-

tiff's proposal of May 26, 1930, without charging for full capacity in high season where the occupants of a room were less, to the extent described in the proposal, than could be accommodated in the room.

28. Plaintiff's agreement of May 26 to charge only the occupied space rate in lieu of the capacity rates on staterooms resulted in a difference of $43,419 on high-season sailings, and a difference of $105,640 on off-season sailings, or a total of $149,059 less than capacity rates on rooms, the exclusive occupancy of which was requested by the War Department and agreed to by plaintiff. These figures are without the 12% reduction of combined one-way fares for "off-season" travel.

29. The way in which tickets were issued has been set forth in finding 20. The procedure after the issuance by plaintiff of east-bound tickets was as follows:

On each ticket there was entered the one-way tariff rate applicable to the particular accommodation east-bound in the winter or summer season, depending on date of sailing. Plaintiff then compiled a passenger list of pilgrims sailing on the east-bound steamer on which list was indicated opposite each pilgrim's name the room number and berth in the room, name of pilgrim, ticket number and the one-way tariff rate for the particular accommodation, and, lastly, the total money value of tickets at one-way full-face tariff rates. The list, as thus prepared, was certified by plaintiff and Capt. Shannon of the Quartermaster General's office, as follows:

> Certified correct, for United States Lines Operations, Inc.
> C. H. McGuire, Passenger Representative.
> Certified correct, for the War Department.
> R. E. Shannon, Captain, Quartermaster Corps.

In addition to the above-mentioned certificates there was also added by defendant's representative an additional certificate on the lists of passengers sailing May 28, as follows:

> I further certify that where berths are designated by an asterisk (*) the exclusive occupancy of the stateroom was demanded by the War Department for the number of persons shown. R. E. Shannon, Captain, Quartermaster Corps.

On sailings after May 28, the certificate read as follows:

> I further certify that where one-third or one-half of a stateroom is shown as assigned to a passenger, the exclusive occupancy of such stateroom was demanded by the War Department for the number of persons listed for said room. R. E. Shannon, Captain, Quartermaster Corps.

Plaintiff then received from Captain R. E. Shannon the official government transportation request, as hereinbefore set forth, for the number of cabin-class accommodations east-bound, as shown on the certified list, on which transportation request was entered by plaintiff the total money value, at full-face tariff rates, of tickets issued for the number of accommodations requested on the particular steamer east-bound.

The procedure as to west-bound tickets, issued at the same time as the east-bound tickets, was exactly the same as stated above.

30. Plaintiff then submitted to the Finance Officer of the U. S. Army on the regular official government voucher form its bill at full one-way tariff rates for cabin-class accommodations for the number of passengers "as per certified statement attached." The voucher contained a certificate by plaintiff's authorized passenger representative as follows:

> I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received, and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service. In accordance with agreement dated March 29, 1930.

The last sentence of the foregoing was added to the printed form by plaintiff before subscribing to the account, except that it was not added on the first vouchers for the first east-bound sailing May 7, nor to the voucher of May 7, for the return west-bound sailing May 29 of the same party of pilgrims.

The voucher was then certified by the Senior Transportation Rate Auditor of the Finance Office, U. S. Army, as follows:

I certify that the above services were rendered as stated and they were necessary for the public service.

31. The Finance Officer of the War Department issued separate checks on the same day in payment for the tickets for east- and west-bound sailings, respectively, usually before or just after the east-bound sailing, based upon the vouchers presented. The transmission of checks to plaintiff was accompanied in each instance by a notice that the check was in settlement of a particular voucher for a particular steamship "sailing east-bound" or "sailing west-bound" as the case might be.

32. Defendant did not, by any of its officers, question 26 vouchers or settlements thereof made from May 7 to July 23, 1930, at full face amount of one-way tariff rates east-bound and west-bound in the total amount of $743,211.50, until July 23, 1930, when the finance officer of the War Department sent plaintiff a written request that the *per capita* fare shown on vouchers submitted be corrected to a basis of 12 percent discount in accordance with tariff, effective January 1, 1930. Plaintiff immediately protested to the Finance Officer that under the agreement of March 29, 1930, the provision in the tariff for a reduction of 12 percent on round-trip fares in "off-season" was not applicable, and on July 25 wrote the Quartermaster General as follows:

Dear General DeWitt:

We have for acknowledgment letter dated July 23rd, 1930, signed by Captain P. A. Scholl, of the Finance Department, Transportation Branch, copy of same being attached hereto, in which copy it is requested "the per capita fare be corrected to basis of 12% discount in accordance wtih tariff effective January 1st, 1930" on Gold Star Mothers and Widows Pilgrimage Movement to Europe.

We refer to conference held in your office yesterday, at which Colonel Gibson, your assistant Major Harper, Finance Officer, Captain Scholl, Mr. Gardner, Legal Advisor, your Auditors and our Mr. Hagerty were present.

We are presenting you herewith some of the salient points discussed at this conference, with a view to clearly and succinctly stating the matter in order that a mutual waiver of rights may be made in the form of an amendment to our proposal to the War Department.

We wish to point out—

1. The original proposal submitted to the War Department incident to the movement, and after a series of conferences in which the methods of negotiations were discussed, was purely in the nature of a memorandum.

It was our understanding, from the information furnished by Colonel Gibson and General DeWitt at that time, that the War Department was not in a position to enter into a formal contract, inasmuch as the question of finances and other pertinent facts were not, at that time, definitely determined.

In these preliminary conferences, discussion of the 12% reduction on round-trip fares, off-season, was avoided. This was deliberately accomplished because it was mutually understood that the question of service was the paramount thing to be considered by your office, our Government, and the United States Lines.

Had the request been made for a formal contract, we would have outlined completely each and every pertinent provision, which we believe should have been made an essential part of this agreement.

2. We have been actuated by a most earnest desire to cooperate with your Department to the fullest extent, because of the conviction that the success of the Gold Star Mothers Pilgrimage is of tremendous national importance, not only to the present Administration, the War Department, the Gold Star Mothers themselves, but also to the United States Lines because of our plans for future development.

Realizing this responsibility, we immediately attempted to build and actually accomplished a spirit within our organization which has manifested itself during the movement. We feel that our services have reflected credit on the War Department, our Government and the United States Lines. We have not avoided a single issue, nor have we failed to provide what you considered necessary, after a consultation with you, those things which, in your opinion, would be conducive to a more satisfactory conclusion of this Pilgrimage.

3. On May 15th, our Mr. Hagerty had a conference with you and Colonel Gibson, in your Office of the War Department. This conference was called because of the sailing of the S. S. *Republic* on May 15th, which vessel carried those originally scheduled to sail on the S. S. *President Harding* on May 14th, as well as the passengers definitely booked on the S. S. *Republic*. At that

conference you stated that "the handling of this enterprise was not a question of money, but one of satisfactory accommodations, imposing an obligation on the War Department to avoid criticism". You stated "that you would pay full fare for the capacity of each room, even if four-berth rooms were occupied by only two Mothers". This understanding was confirmed in writing to you, through Colonel Gibson.

4. Your Finance Officer has raised an issue in connection with this proposal, and insists that tariff rates must apply, because the contract (and our proposal has been interpreted by the Finance Officer as a contract) specifies tariff rates apply Eastbound and Westbound.

We have reluctantly pointed out that the subsequent agreement made with you on May 15th is under this interpretation also a contract, and that under the law, you have the necessary authority to make such a supplementary agreement. Under the terms of this agreement we could rightfully charge the War Department full capacity for each room, under a strict interpretation of the phrase "tariff". We could also have charged tariff under this interpretation, for each and every improvement made from accommodations assigned, on both the Eastbound and Westbound sailings. As you know, there have been many of these improvements, and under no circumstances, have we charged either for capacity or for improvement, in view of the exceedingly friendly and gentlemanly manner in which your officers have cooperated with our representatives.

We do not wish to be technical, but we must interpret this entire agreement as a contract, in view of the stand taken by your Finance Officer. Your Legal Adviser has concurred in this view, and in the conference yesterday, stated that the United States Lines had the right to bill you to capacity on each Eastbound and Westbound sailing, and that under the interpretation of the tariff, we could charge you for the improvements made.

5. In view of the stated indebtedness of the United States Lines to the War Department, in the amount of $54,000.–, as indicated by your Auditor yesterday, we have made an approximate accounting of our records, based upon a strict interpretation of our agreements, as contracts. From the estimate of the capacity payments for the rooms assigned you Eastbound and Westbound, and from the improvements made at the tariff rates, we have concluded that the War Department is indebted to us in the sum of $100,194.70.

We do not wish to extend this controversy. Our relations have been most amicable and most friendly, and we, like you, have always considered that the paramount and ultimate object behind our endeavors is the final success of this movement.

In the conference yesterday, it was, therefore, agreed that we should waive our rights under our contract to demand payment on a capacity basis, provided that the War Department will agree to waive its claim to the 12% reduction on off-season sailings.

We feel, in view of the preliminary negotiations, to which you were a party, and which we all thoroughly understood at the time they were made, and because of subsequent transactions, and the issue that has now been raised, that the most amicable, most advisable method of settling this difficulty is by waiver outlined above. Clearly you will observe that it is to the advantage of the War Department to concur in this opinion.

We wish to reserve the right to amend or change this proposal at any time, prior to acceptance by you, and it is submitted on the further condition that the War Department will make no other claim for reduction of fares.

33. August 26, 1930, the Quartermaster General wrote the Chief of Finance as follows:

SUBJECT: Supplemental agreement with United States Lines.

TO: Chief of Finance.

1. There is transmitted herewith a letter dated July 25, 1930, from Mr. Tarleton Winchester, Passenger Traffic Manager of the United States Lines, in which the United States Lines offers to waive their right to demand payment on the basis of room capacity for accommodations furnished mothers and widows travelling on their ships provided the War Department will agree to waive its claim to the 12% reduction on off season sailings.

2. An opinion is requested as to whether or not I have the right to accept this proposal. The facts in the case are as follows:

Under date of April 5, 1930, the United States Lines transmitted a proposal, dated March 29, 1930, a copy of which is attached hereto, covering the combined movement of both white and colored mothers and widows for the sea portion of the pilgrimage to the cemeteries of

Europe as authorized by the Act of March 2, 1929. This proposal was signed by Owen A. Smyth, Passenger Traffic Manager, and provided in part:

"We agree to provide cabin accommodations in the number and on the vessels indicated in the attached list at tariff rates for the accommodations occupied, East and West bound."

Under date of April 9, 1930, the Quartermaster General acknowledged receipt of this proposal and definitely accepted it on behalf of the War Department. A copy of this acceptance is attached hereto. This proposal and acceptance constitute an informal contract. Settlements for the first four Eastbound and first five Westbound sailings were made accordingly on a per berth basis.

On May 15, 1930, a conference was held in my office between me and my assistants and Mr. John J. Hagerty, General Field Agent of the United States Lines, at which Mr. Hagerty was advised that I desired the maximum possible number of lower berths be assigned for the use of mothers and widows; that the handling of this enterprise was not a question of money, but one of satisfactory accommodations being furnished, and that I was willing to pay full fare capacity for each room even if four berth rooms were occupied by only two mothers. As a result of this conference, the United States Lines placed stop orders with their agents covering all unsold accommodations on the ships on which reservations had been made for the War Department and have made every effort to improve the accommodations provided for the mothers and widows and to provide the maximum possible number of lower berths.

Confirming the agreement reached at this conference, Mr. Hagerty addressed a letter, under date of May 26, 1930, to Colonel W. R. Gibson, in my office. A copy of this letter is enclosed herewith, which reads in part as follows:

"The rule of our company on all high season sailings makes it imperative for us on regular sailings to book rooms to capacity. In other words, a four-berth room is occupied by four passengers and a three-berth room by three passengers. In an effort to show our desire to cooperate with the War Department the officials of our company have decided to charge only the three in the room rate where three people occupy a four-berth room. This decision, of course, means that we will lose the balance of the revenue we would otherwise accrue had

we booked four passengers in the room. They have also decided to charge the two in the room fare where two Mothers or Widows occupy a three- or four-berth room. This is a material concession as you will observe and means a substantial loss of revenue particularly on high season sailings. It is contemplated that in order to fulfill the requirements of General DeWitt it will be necessary for us to issue tickets on the above basis and to avoid any misunderstanding at a later date we will greatly appreciate your supplementing our agreement by letter advising that this agreement is entirely satisfactory to the War Department."

Under date of June 4, 1930, I acknowledged the receipt of this letter, but since the point at issue was one of providing the best possible accommodations rather than what should be paid for such accommodations I did not definitely specify that the War Department would accept the proposal which provided for billing on the room rate rather than the berth rate. A copy of my letter of June 4, 1930, is also attached hereto. Settlements since June 4, 1930, have been on the basis indicated by the U. S. Lines.

Prior to the time that the United States Lines submitted their proposal, dated March 29, 1930, there had been numerous informal conferences between me and my subordinates with representatives of the United States Lines regarding this matter, but since an appropriation to cover the cost of the pilgrimage had not been made by Congress it was not possible for us to take any definite action that would be binding upon the Government. During these preliminary conferences the question of the 12% reduction for off-season sailings was not stressed and so far as the records of this office show it was mentioned but once. In a letter dated June 19, 1929, the United States Lines raised the question of off-season travel and the deductions allowable. In this letter, a copy of which is attached hereto, it is stated:

"* * * it would be much better if their transportation could be provided in what is termed 'off-season' when a 10% reduction is available. These periods are: Eastbound—August 16th to May 15th, Westbound—October 16th to July 15th. If travel is one way in off-season and one way in height of the season the 10% reduction is applicable on one-half of the fare."

3. The question involved in the matter depends upon the meaning of the term "tariff-rates" and also as to whether or not the proposal of the United States Lines,

contained in their letter of May 26, 1930, and my acknowledgment of this in my letter dated June 4, 1930, constitute a supplemental agreement to the original proposal and acceptance. If the United States Lines have the right to bill the Government for the number of berths in rooms actually occupied it is manifestly to the advantage of the Government to accept their proposal dated July 25, 1930. If they have waived their right to so bill the Government by their letter of May 26, 1930, then no advantage would accrue to the Government by the acceptance of their proposal. I find myself unable to determine this matter and request a decision on the subject. If it is necessary to submit this matter to the General Accounting Office, I will be pleased to furnish any additional information that may be desired and to personally appear before representatives of the General Accounting Office and I am informed that the United States Lines would also be pleased to furnish any additional information or to have their representative appear in person to clarify this subject.

34. September 15, 1930, the Finance Officer of the War Department wrote plaintiff as follows:

Referring to movement via the U. S. Lines Operations, Inc., of "Mothers and Widows of Deceased American Soldiers, Sailors and Marines to War Cemeteries in Europe" and return; all bills of your company heretofore settled were paid on basis of full tariff rates, for the accommodations occupied east and west bound, although tariff provides that round-trip rates are made by deducting twelve per-cent from combined east and west-bound fares on movements during "off-season", i. e., East-bound, July 16th to May 15th, inclusive, West-bound October 1st to July 31st, inclusive.

Bills for the "off-season" period are Nos. 1 to 6, 8, 10, 11, 13, 15, 18 to 21, 23, 24, 26, 28, 31 to 33, 35, 37, 38, 40 to 42, 44, 45, 47, 49, 50, 53, 54 and 56 and were paid in total amount of $610,908.00, although a deduction of 12% or $73,308.96 was applicable thereto.

Bills Nos. 51 and 52, in amounts of $38,327.50 and $45,394.50, respectively, were retained for purpose of adjustment of the 12% allowance amounting to $73,308.96. In addition thereto an allowance of $4,599.30 is applicable on bill No. 51, making a total of $77,908.26, which it is now proposed to deduct from these bills in final settlement for this reason, which leaves a balance due the U. S. Lines of $5,813.75 only.

> Please indicate your acquiescence in the premises by return mail upon receipt of which this office will cause a check in the above amount, $5,813.74, to be issued in final payment.

September 18, 1930, plaintiff advised defendant that it refused to acquiesce in the deduction.

35. September 23, 1930, the Secretary of War transmitted to the Comptroller General plaintiff's letter of July 25 and the Quartermaster General's letter of August 26, 1930, and asked the Comptroller General for an opinion "as to whether or not I have authority to accept this [plaintiff's] proposal." The Comptroller General advised the Secretary of War October 6, 1930, that he did not have authority to waive the 12 percent deduction, stating in part as follows:

> In so far as the proposal relates to service heretofore performed I have to advise that the acceptance thereof is not authorized for the reason that claims under existing Government contracts, or disputes as to their interpretation or construction affecting payments to be made thereunder, are not authorized by law to be settled or adjusted administratively—by means of a negotiated settlement agreement or otherwise—but are for submission to this office for adjustment and settlement pursuant to the provisions of section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, 42 Stat. 24. Viewing the said proposal as relating only to service to be performed hereafter, and thus as in the nature of an amendment to the existing contract, its acceptance is not authorized because it is not shown to be in the interest of the Government and no contracting or other administrative officer has the power or authority,—in the absence of a statute specifically so providing,—to waive any right acquired by the Government under a contract. Accordingly, the specific question presented must be and is answered in the negative.

36. October 27, 1930, defendant's finance officer advised plaintiff by letter that in order that settlement of plaintiff's bills W–51 and W–52, aggregating $83,722 for transportation on the S. S. *America* sailing August 27 and S. S. *President Harding* sailing September 18, might not be delayed any longer, the sum of $77,908.26 was being deducted from said bills and a check in full settlement of the balance of

$5,813.74 due was being transmitted, together with a copy of the statement of deduction.

37. Of the amount deducted in settlement of bills W-51 and W-52, the sum of $17,953.80 represents 12 percent of combined one-way fares previously settled in full for pilgrims sailing eastbound on S. S. *America* May 7, and westbound on S. S. *President Harding* sailing from Cherbourg May 29; and pilgrims sailing eastbound on S. S. *Republic* May 13, and westbound on S. S. *Republic* and S. S. *George Washington*, sailing from Cherbourg June 4 and June 5, respectively. The remainder of the sum deducted amounting to $59,954.46 represents 12 percent of one-way portions of fares for trips in off-season by those pilgrims who traveled one-way in off-season and one-way in the high season, and which had been previously settled at the one-way rate as billed.

Of the amount deducted on October 27, 1930, from plaintiff's bills W-51 and W-52, aggregating $77,908.26, the Finance Officer of the War Department subsequently made refunds aggregating $928.98, erroneously deducted from tariff fares for colored mothers.

38. The last check remitted by the paying officer to plaintiff as the balance claimed by the defendant to be due, numbered 449,069 and in the sum of $5,813.74, has not been cashed and is being held by plaintiff.

FACTS ON COUNTERCLAIM

39. During the year 1930 the plaintiff, a New York corporation, operated a passenger and freight steamship line under the trade name of "United States Lines" between the port of New York and ports in Great Britain, France, and Germany, and maintained its principal offices at 45 Broadway, New York City. It also operated during that year a passenger and freight steamship line under the trade name of "American Merchant Line" between the port of New York and ports of Great Britain.

Prior to 1929 the United States Lines had been operated by the United States Shipping Board. Pursuant to a pub-

lic policy adopted by Congress the lines had in 1929 been offered for sale at public auction, and a private corporation, United States Lines, Inc., took the ships over from the successful bidder who formed the corporation for that purpose and gave a purchase mortgage to the Shipping Board therefor. The contract of sale between defendant and the United States Lines, Inc., was dated March 21, 1929. United States Lines, Inc., formed a wholly-owned subsidiary corporation, United States Lines Operations, Inc., plaintiff herein, for operating the vessels. The parent company owned the ships; the subsidiary operated them.

40. April 1, 1930, plaintiff as lessee and defendant as lessor, the latter represented by the United States Shipping Board acting by and through the United States Shipping Board Merchant Fleet Corporation, herein referred to as the "Fleet Corporation," entered into a written agreement, pursuant to which the lessee occupied 21,880 square feet of space in a certain office building owned by the United States and located at 45 Broadway, New York, for the term commencing April 1, 1930, and ending at 12 o'clock midnight, June 6, 1930, at a rental of $16,183.56. The agreement provided that the lessor might terminate the lease upon 60 days' notice. No right of termination was given to lessee. The lessee paid the rent reserved in the agreement. A copy of the agreement is in evidence and is made a part hereof by reference.

Thereafter the parties, on June 6, 1930, entered into an extension agreement whereby the lease of April 1, 1930, was extended to 12 o'clock midnight, June 6, 1931, upon the same terms, covenants, and conditions as contained in the agreement of lease of April 1, 1930, which was made a part thereof, at a rental of $7,356.16 a month, payable monthly in advance. This extension agreement also contained a provision that the lessor might terminate the lease at any time upon 60 days' notice. It contained no provision for termination of the lease by the lessee. The lessee remained in possession and paid the agreed rent. A copy of the extension agreement is in evidence and is made a part hereof by reference.

41. The original agreement of April 1, 1930, provided in part as follows:

> It is expressly understood and agreed, that in the event the Seller, as defined in that certain contract between the United States of America, represented by the United States Shipping Board acting by and through the United States Shipping Board Merchant Fleet Corporation, a District of Columbia corporation, and United States Lines, Inc., a Delaware corporation, dated March 21, 1929, shall under the provisions of subparagraph (b) or (c) of Article "9" of said contract, demand the surrender of the actual possession of all vessels mentioned in said contract, then this lease and the term hereof shall forthwith be and become void, and without any action on the part of the Landlord or Tenant cease and determine; and the Tenant undertakes and agrees in the event aforesaid, forthwith to surrender and deliver up possession of said premises to or upon the order of the Landlord.

42. United States Lines, Inc., became financially embarrassed in or before 1931, and unable wholly to meet its obligations, and in the early part of 1931 so notified the Merchant Fleet Corporation.

It appeared that United States Lines, Inc., would default on certain obligations under which ships were being constructed and, when this appeared, it was agreed that four out of the seven directors of United States Lines, Inc., should be nominated by the Shipping Board, and these four, constituting a majority of the board of directors, were nominated by the Shipping Board and elected March 10, 1931, and remained as directors until October 30, 1931. None of the directors were employees of the United States or the Fleet Corporation. The same arrangement as to nominations and election of the board of directors was effected with respect to plaintiff. The United States Lines, Inc., and plaintiff had the same officers and directors.

43. May 19, 1931, plaintiff requested of the Fleet Corporation a renewal of the lease extension under the same terms and conditions, except that plaintiff would give up a designated part of the space at that time occupied in the basement, and give up the remainder of the space in the base-

ment then occupied at such time as the Fleet Corporation might find a tenant for the entire basement, rent to be at the same rate per square foot for the space occupied. May 23, 1931, plaintiff amended this request to the extent that it would give up all space on the basement floor for 900 square feet in the sub-basement. The total proposed reduction of space was 3,030 square feet.

The Fleet Corporation did not accept this request and offer on the terms stated by plaintiff. It offered to renew the lease on terms and conditions stated by plaintiff as to the space to be occupied, the terms of lease, and rate of rental, the plaintiff to agree to the following additional stipulation, the defendant being party of the first part and plaintiff party of the second part:

> It is further agreed between the parties hereto that in case the United States Lines, Inc., parent Company of the Party of the Second Part, shall file a petition in bankruptcy or be adjudged bankrupt or make an assignment for the benefit of creditors or commit any act of bankruptcy or take advantage of any insolvency act or in case any Court in Equity, Admiralty or Bankruptcy shall appoint a Receiver of said United States Lines, Inc., or of any of its vessels, or without limitation of the foregoing commit any act under the provisions of that certain agreement dated March 21, 1929, between the United States Lines, Inc., and the Party of the First Part which will constitute a total default thereunder or commit any act of default whereby the Party of the First Part shall be entitled to any of the remedies set forth in that certain blanket preferred mortgage dated June 7, 1929, and executed by said United States Lines, Inc., in favor of the Party of the First Part, then the said Lease Agreement dated April 1, 1930, as hereby extended and all rights and interest of the Party of the Second Part shall be terminated at the election of the Party of the First Part and without any previous notice and the Party of the First Part shall be entitled to the immediate possession of the premises and of the furniture therein belonging to the Party of the First Part, which said premises and furniture the Party of the Second Part agrees to surrender and deliver to the Party of the First Part.

The Fleet Corporation through its general counsel and its president prepared a form of renewal extension of the lease

expiring June 6, 1931, for another year, embodying the terms and conditions proposed by plaintiff, and this lease with the proposed addition above-mentioned was submitted to plaintiff on or about June 5, 1931. Plaintiff did not sign the form so proposed and it was not signed by either party.

44. After expiration on June 6, 1931, of the renewal lease of June 6, 1930, plaintiff continued, without having paid any rent since February 1, 1931, to occupy the original space above the basement, assumed occupancy of only 900 square feet in the subbasement, and continued occupancy of 1,068 square feet in the basement.

August 25, 1931, plaintiff requested of the Fleet Corporation, through the District Director of that corporation, in New York, that a release be arranged as of August 31, 1931, of certain rooms on the third floor comprising 307 square feet and certain space in the front of basement comprising 233 square feet, a total of 540 square feet. The Fleet Corporation, by its president, agreed in writing to the release and, after August 1931, the Fleet Corporation ceased billing plaintiff for 540 square feet so released.

September 16, 1931, plaintiff requested the Fleet Corporation to release as of September 30, 1931, the remaining basement space of 835 square feet. This the Fleet Corporation, by its president, agreed to in writing and, after September 1931, it did not bill plaintiff for 835 square feet so released.

45. Soon after the old lease had expired and the proposed renewal lease prepared by the Fleet Corporation had been delivered to plaintiff, but to which plaintiff had not replied and which had not been signed and returned by plaintiff, the District Director of the Fleet Corporation at New York instructed his first clerk, Fergus P. Mullins, to get in touch with plaintiff and find out about the new lease renewal. The first clerk spoke to M. B. Rogers, plaintiff's vice president, about the execution and return of the renewal lease, and Mr. Rogers stated at that time that it would be taken care of soon—that it was a routine matter. Three or four days later, not having heard from plaintiff, the District Director's office again spoke to Mr. Rogers and advised him that something should be done about it. The Fleet Corporation at Washington had inquired of the District Director at New York as to

why the lease had not been signed by plaintiff. After the last-mentioned inquiry of Mr. Rogers, the District Director's office of the Fleet Corporation inquired of its local counsel as to the New York rental law with reference to the holding over by government tenants in government buildings. Three or four days later the first clerk again communicated with Mr. Rogers and advised him that if the lease was not signed by plaintiff and it continued to occupy the property the District Director's office would assume that the lease was to run for another year and that the District Director would so advise the Fleet Corporation, and that the District Director would continue, as in the past, to bill, through the Fleet Corporation at Washington, the United States Lines for rent each month as had been done for the past year.

Plaintiff made no reply to this and nothing further was said or done by plaintiff until sometime in August 1931, except that the Fleet Corporation in Washington continued, in the same way as during the past year, to send bills monthly in advance for the rental as stipulated in the expired lease and as modified as to space after August 31, 1931. These bills, like all prior bills for rental were made out to "U. S. Lines, Inc." up to December 3, 1931. The bill for rent December 3 to 31, 1931, was made out to "U. S. Lines Co. of Nevada" and mailed December 1, 1931. The rental bills sent January 1, 1932, and each month thereafter for rent January 1 to June 6, 1932, were made out to "U. S. Lines Operations, Inc."

After the last above-mentioned talk with Rogers early in June 1931 the Fleet Corporation in Washington instructed its assistant general counsel, Wade H. Skinner, to inquire of plaintiff as to why the renewal lease had not been signed by it. Skinner talked to the District Director at the New York office about the matter and thereafter, in early August 1931 talked with plaintiff's general counsel and certain of its officers about the execution by plaintiff of the renewal lease, and the officials to whom he talked, in explanation of the failure of plaintiff to sign the renewal lease and as to the reason why the lease had not been signed by plaintiff, stated "that the Fleet Corporation well knew it was then going through a period of reorganization and were not certain whether it would be in business any longer, and they [the

U. S. Lines, Inc., and plaintiff] had notified the government they could not operate the service; and they [plaintiff and U. S. Lines, Inc.] defaulted on their obligations and would not sign any lease for a year, when they [U. S. Lines, Inc., and plaintiff] expected to pass out of the picture." Nothing further appears to have been done or said by or between plaintiff and the Fleet Corporation concerning the matter of lease renewal, or as to the term of occupancy of the premises by plaintiff, until the reorganization agreement dated October 30, 1931, between the United States, represented by the Fleet Corporation, and the United States Lines Company, a Nevada corporation, hereinafter mentioned. The evidence does not disclose what report if any Skinner made to the Fleet Corporation or to its President, Crowley.

46. United States Lines, Inc., defaulted on the mortgage payments to defendant early in January 1931, and formally notified the Shipping Board and the Fleet Corporation that it was financially unable to pay the balance due on the purchase price of the vessels sold to it by the Shipping Board in 1929, and/or to continue to operate said vessels, and that it was then unable to meet its agreed payments of 25 percent of the cost of constructing certain vessels jointly with the Fleet Corporation then under construction. Thereupon the United States through the Shipping Board, mortgagee, acting by and through the Fleet Corporation, became interested in a proposed reorganization of United States Lines, Inc. The officials of the Shipping Board and the Fleet Corporation discussed the position of United States Lines, Inc., and its subsidiaries with various steamship men in New York and over the country in an endeavor to interest one steamship company or a combination of companies to invest new capital in the United States Lines, Inc., and to take over its business and affairs and successfully operate the ships. The final result was a call by the Government through the Fleet Corporation for public bids for reorganization of United States Lines, Inc. The bids were opened August 13, 1931. The highest bidder, whose bid was accepted, associated himself with others, and thereafter the reorganization and taking over of United States Lines, Inc., and the assumption of its liabilities and those of its subsidiaries, as set forth in the

agreements as hereinafter mentioned, were finally worked out and an agreement was executed October 30, 1931, covering the reorganization of United States Lines, Inc., into a new company, created under the laws of Nevada, called United States Lines Company. This agreement and the annexed schedule "A," made a part thereof, entitled "Report and Accounts" prepared by Price, Waterhouse & Company, are in evidence as plaintiff's exhibit 22 and are made a part hereof by reference. This agreement was "between the United States of America, hereinafter called 'Board' represented by the United States Shipping Board acting by and through the United States Shipping Board Merchant Fleet Corporation, * * * and United States Lines Company, a Nevada corporation, having a place of business at No. 1 Broadway, New York, State of New York, hereinafter called 'Company'." This agreement, so far as material here, stated as follows:

> Whereas the said United States Lines, Inc., has formally notified the Board that it is financially unable to pay the balance due on the purchase price of the aforesaid vessels, and/or to continue to operate said vessels, and
>
> Whereas the Company has submitted a proposal [Finding 47] for the operation of said vessels and the reorganization of said United States Lines, Inc., which is satisfactory to and has been approved by the United States Lines, Inc., and the Board, and pursuant thereto the said United States Lines, Inc., has agreed to sell to the Company and the Company has agreed to purchase all of its assets, including the capital stock of all its subsidiaries, and to assume all their liabilities as shown on the balance sheet dated August 31, 1931, hereto annexed and marked Schedule A, and liabilities thereafter incurred except the aforesaid notes of the United States Lines, Inc., with interest thereon, and claims due stockholders as stockholders, subject to provisions of Article 3 hereof, * * *.
>
> Article 2: The Company agrees to take over all of the assets of the United States Lines, Inc., including the vessels hereinafter named, its goodwill, trade names, trade-marks, patents, licenses, leases, and entire capital stock of its subsidiary company, the United States Lines Operations, Inc., and assume and agree to pay in the regular course of business, all of the liabilities of the United States Lines, Inc., and of its subsidiary, United States Lines Operations, Inc., assumed by the Company.

The balance sheet dated August 31, 1931, referred to in this agreement and annexed thereto as Schedule A, consisted of certain documents setting forth the results of an examination and audit by Price, Waterhouse & Co. of the books and accounts of United States Lines, Inc., and its subsidiary companies as at August 31, 1931, "for the purpose of ascertaining the companies' financial position at that date." These documents comprising Schedule A were entitled "REPORT AND ACCOUNTS." This "Schedule A," annexed to and constituting a part of the agreement of October 30, 1931, signed by the parties, consisted, in addition to a letter of transmittal dated October 8, 1931, signed by Price, Waterhouse & Co. addressed to P. W. Chapman, President, United States Lines, Inc., of the following: a consolidated balance sheet, "Exhibit I" of United States Lines, Inc., and subsidiary companies, listing and describing their assets and liabilities, including the capital stock and setting forth the amounts thereof as of August 31, 1931, which balance sheet (Exhibit I) contained the following: "Note—The company is subject to certain contractual obligations, schedules of which are attached and made part hereof". "Exhibit II" of this "REPORT AND ACCOUNTS," referred to in the consolidated balance sheet, was a consolidated statement of profit and loss of United States Lines, Inc., and subsidiary companies for the eight months' period ending August 31, 1931, and of deficit at that date.

"Exhibit III" to the consolidated balance sheet and a part of the "Schedule A" was a "summary of office and pier leases of United States Lines, Inc., and subsidiary companies in force August 31, 1931," consisting of 50 separate leases.

"Exhibit IV" attached to the consolidated balance sheet and a part of "Schedule A" was a summary of major contractual obligations of United States Lines, Inc., and subsidiary companies in force at August 31, 1931, other than leases.

"Exhibit V" attached to the balance sheet, and being a part of "Schedule A," was a certificate by the treasurer of United States Lines, Inc., and its subsidiary companies, with reference to the total annual salary roll as of August 31, 1931; and "Exhibit VI" to the consolidated balance sheet, and being also a part of "Schedule A," was a certificate by the companies' general counsel giving a list of pending suits against United

States Lines, Inc., and/or United States Lines Operations, Inc. The "REPORT AND ACCOUNTS" and the consolidated balance sheet therein, covering United States Lines, Inc., and its subsidiaries, including plaintiff, included the lease here in controversy, and in "Exhibit III" which was a part of the balance sheet, summarized the lease as follows:

> Lessor—United States Shipping Board Merchant Fleet Corp.
> Premises—45 Broadway, New York, N. Y.
> Purpose—General and New York passenger and freight office.
> Term—Month-to-month basis.
> Annual rental—$7,085.23 monthly.
> Remarks—Lessor can terminate agreement by sixty days' written notice to lessee. Lease terminated June 6, 1931, not renewed but continued on a month-to-month basis. Agreement includes use of furniture and fixtures in building at time of occupancy.

By this reorganization transaction and the agreement of October 30, 1931, plaintiff became the wholly owned subsidiary of United States Lines Company, the new company.

47. Prior to the signing of the reorganization agreement of October 30, 1931, hereinbefore mentioned, between the United States and the United States Lines Company of Nevada, the United States Lines Company on October 28, 1931, in accordance with a prior understanding approved by the United States, acting through the United States Shipping Board Merchant Fleet Corporation, made a written proposal to United States Lines, Inc., offering to purchase from it all its assets of whatsoever character or description and wheresoever situated, including ten designated vessels of that company, its goodwill, trade names, trade-marks, patents, licenses, leases, the capital stock of its subsidiary company, including plaintiff, in consideration of, among other things—

> (b) The assumption and agreement of the undersigned to pay in the regular course of its business only the liabilities shown in the "Report and Accounts" of United States Lines, Inc., and subsidiary companies as of August 31, 1931, prepared by Price, Waterhouse & Co., dated October 8th, 1931, as initialed by the undersigned;

(c) Also the assumption by the undersigned of all liabilities contracted by the United States Lines, Inc., and/or any of its subsidiaries in the usual, ordinary, and regular course of its business since the 31st day of August, 1931; * * *.

This offer was duly accepted by United States Lines, Inc., by a resolution of its Board of Directors, and the terms and conditions of the offer, as so accepted, were embodied in the agreement between the United States and the United States Lines Company pursuant to the proposal of United States Lines Company theretofore made August 17, 1931, to the United States for the reorganization of the United States Lines, Inc.

The reorganization agreement whereby the United States Lines Company took over the assets and assumed the liabilities of United States Lines, Inc., and subsidiaries, as stated in the agreement, became effective at midnight December 3, 1931, and the United States Lines Company opened its offices at No. 1 Broadway, New York.

On March 23, 1932, the president of the Fleet Corporation wrote the United States Lines Company, stating in part as follows:

Pursuant to the provisions of Article 8 of the agreement dated October 30, 1931, between the Shipping Board and your Company covering the sale of the United States Lines there are transmitted herewith twelve (12) notes in the total sum of $3,367,068.00, and blanket preferred mortgage in duplicate on the vessels named in said Article 8 securing same. The total amount of the notes was determined by adding to the sum of $3,170,900 stated in said Article 8 the sum of $196,168.00 which is the amount determined to be due the United States Shipping Board from the United States Lines, Inc., and United States Lines Operations, Inc., as of midnight, December 3, 1931, the date the sales agreement became effective, plus 48¢ which we understand your Company is willing to pay in cash to avoid a fractional part of a dollar recited in the notes. * * *.

Will you please execute the notes, mortgages, * * * in order that the mortgages may be recorded * * * and such other steps taken as may be necessary to make the blanket mortgage a preferred lien on the vessels designated therein.

48. January 1, 1930, to July 15, 1932, Wade H. Skinner was Assistant Counsel of the Fleet Corporation in charge of the Contract Division and was also in charge, for the Legal Division of the Fleet Corporation, of the preparation of the reorganization agreement of October 30, 1931, between the Fleet Corporation and the United States Lines Company, to which agreement was attached an audit by Price, Waterhouse & Company, dated October 8, 1931.

49. Wade H. Skinner, assistant general counsel of the Fleet Corporation, did not check the Price, Waterhouse audit, nor did he read the statement in Exhibit III to the balance sheet, and made a part thereof, describing the lease between plaintiff and the Fleet Corporation covering premises 45 Broadway, as being on a month-to-month basis, and that "Lessor can terminate agreement by sixty days' written notice to lessee. Lease terminated June 6, 1931, not renewed, but continued on a month-to-month basis. Agreement included use of furniture and fixtures in building at time of occupancy."

50. Elmer E. Crowley, who was president and a trustee of the Fleet Corporation from April 19, 1931, to June 30, 1932, did not read the Price, Waterhouse audit before or at the time he signed the agreement of October 30, 1931, and did not know that the statement in Exhibit III concerning the rental of premises at 45 Broadway by the Fleet Corporation to plaintiff was contained therein.

51. The only person, committee, or board that had authority to continue plaintiff in possession of premises at 45 Broadway after the expiration on June 6, 1931, of the lease of June 6, 1930, as a month-to-month tenant, on a tenancy at will, or other basis, was Elmer E. Crowley as president of the Fleet Corporation, the Board of Trustees, the Executive Committee of the Fleet Corporation, or the United States Shipping Board.

52. The customary procedure of the Fleet Corporation was to refer contracts, such as an agreement to permit plaintiff to remain as a tenant from month-to-month or at will after the expiration of an express lease for a term, to the Board of Trustees of the Fleet Corporation. The agreement

of October 30, 1931, was signed pursuant to authority of the Board of Trustees.

53. There was no oral or written agreement, except the agreement of October 30, 1931, between plaintiff and any one, or more, of the following: The Fleet Corporation, Board of Trustees of the Fleet Corporation, Executive Committee of the Fleet Corporation, Elmer E. Crowley as president of the Fleet Corporation, or the United States Shipping Board, continuing plaintiff as a tenant of No. 45 Broadway on a month-to-month tenancy, tenancy at will, or other basis, after the expiration of the lease between plaintiff and the Fleet Corporation dated June 6, 1930.

No request was made of the Fleet Corporation by plaintiff that it be permitted to remain in possession of said premises on a month-to-month or tenancy-at-will basis after the expiration of the lease of June 6, 1930.

54. December 8, 1931, the United States Lines Company communicated with District Director of the Fleet Corporation at New York by letter as follows:

> Confirming your conversation with Mr. Rogers this morning, this is to advise you that we wish to vacate the space now occupied by the United States Lines at 45 Broadway on or before December 31st, 1931.
>
> Will you kindly advise us that this will be in order and that all charges will cease as of December 31st, 1931?

The entire premises were vacated by plaintiff on December 8, 1931, and were not reoccupied.

55. Plaintiff paid defendant rent for premises at 45 Broadway, as billed by defendant through the month of February, 1931. It defaulted March 1, on the March 1931 rent and remained in default continuously thereafter. January 4, 1932, the General Comptroller of the United States Shipping Board, Merchant Fleet Corporation, prepared and forwarded to United States Lines Company a statement showing all items claimed by defendant to be due from the old United States Lines, Inc., and plaintiff, as at December 3, 1931, which the new company, United States Lines Company, had assumed under the reorganization contract of October 30, 1931. The only items in such statement with reference to rent for

45 Broadway were items for rent from March 1 to December 3, 1931, in the total amount of $64,292.44.

These items of rent for the period from March 1 to December 3, 1931, in the total amount of $64,292.44, were added to the amount for which United States Lines Company gave defendant notes, as set forth in Crowley's letter of March 23, 1932, and such notes have now been paid in full. The item for rent from December 4 to December 31, 1931, was billed by defendant to United States Lines Company (finding 45) and was paid by United States Lines Company to defendant in cash.

56. To the above-mentioned communication of the United States Lines Company of December 8, 1931, the District Director of the Merchant Fleet Corporation replied January 18, 1932, as follows:

> Replying to your letter of December 8th, in which you advise us that you wish to vacate the space occupied by the United States Lines at 45 Broadway on or before December 31st, 1931.
>
> Immediately upon receipt of this letter we communicated with our Washington office, furnishing them with a copy, and I am advised in a letter from the President, under date of January 15th, that in accordance with an opinion of our General Counsel, the United States Lines, Inc., is to be billed for a full year's rental; that is, up to June 6th, 1932.
>
> We will therefore bill you monthly until the expiration date of your lease—June 6th, 1932.

January 20, 1932, the president of the Fleet Corporation notified United States Lines Operations, Inc., plaintiff herein, as follows:

> You are hereby placed on notice that the United States represented by the United States Shipping Board, acting by and through the United States Shipping Board Merchant Fleet Corporation, reserves all rights to it accruing by reason of the lease and/or occupancy by you of certain space in the office building known as 45 Broadway, in the Borough of Manhattan, City, County, and State of New York and particularly, but not exclusively, the right to rental—accrued and/or to accrue—for such space from January 1, 1932, to June 6, 1932.

57. The space remaining unreleased by the Fleet Corporation at the end of 1931 was as follows:

	Square feet
Main floor	8,878
Rooms on 8th floor	5,845
West wing of 9th floor	2,850
Sub-basement	900
	18,473

The proportion of the annual rental applicable to the period beginning January 1 and ending midnight June 6, 1932, was appropriately divided by months and was billed by the Fleet Corporation to plaintiff at the beginning of the month to which applicable, and no part of it has been paid to defendant.

The defendant did not relet the premises for any period between January 1 and June 6, 1932, and they were unoccupied from the beginning of the year to midnight June 6, 1932.

For the period January 1, 1931, to June 6, 1932, inclusive, defendant claims of the plaintiff as unpaid rental $35,014.80, with interest at 6% per annum on amounts of monthly installments of rentals from January 1 to June 6, 1932, until paid.

58. M. B. Rogers, vice president and director of plaintiff, was in charge of matters pertaining to rental by plaintiff of space in No. 45 Broadway and leases covering said space, including leases of April 1 and June 6, 1930, and the unsigned lease of May 28, 1931, which were under his general supervision, subject to control by the Board of Directors of plaintiff.

59. Plaintiff postponed execution of the lease proposed by it May 28, 1931, and as proposed by defendant about June 5, 1931, because the Company was in a chaotic financial condition at that time and there was a question of whether the management and control would change; the signing of the lease was held in abeyance until a contemplated reorganization of United States Lines, Inc., and United States Lines Operations, Inc., could be worked out, such reasons for not signing the new lease continuing until the time when the agreement of October 30, 1931, was signed.

60. The amount of rental for the period January 1 to January 31, 1932, at the rate under terms of the lease, which expired June 6, 1930, was $6,762.75.

The court decided that the plaintiff was not entitled to recover.

The court further decided that the defendant was entitled to recover on its counterclaim.

LITTLETON, *Judge*, delivered the opinion of the court:

By an act of March 2, 1929, 45 Stat. 1508, which was amended April 19, 1930, 46 Stat. 225, Congress authorized the Secretary of War to arrange for pilgrimages to cemeteries in Europe and return for mothers and widows of deceased members of the military and naval forces of the United States whose remains were interred in such cemeteries. Pursuant to this act, as amended, the Quartermaster General, acting for and under written authority from the Secretary of War, after preliminary conferences and negotiations with plaintiff, formally accepted plaintiff's combined proposal dated March 29, 1930 (finding 17), for transporting white and colored mothers and widows on these voyages to Europe and return.

Transportation charges made and paid for transportation of colored mothers and widows to Europe and return are not involved in this suit.

The facts with reference to the conferences and negotiations between plaintiff and the Quartermaster General, the proposals submitted by plaintiff between June 19, 1929, and March 29, 1930, and the correspondence with reference thereto between the Quartermaster General and the plaintiff are set forth in the findings.

Section 2 (c) of the act of March 2, as amended, provided that "The pilgrimages shall be made at such times during the period from May 1, 1930, to October 31, 1933, as may be designated by the Secretary of War."

Subdivision (e) of that section provided that "The pilgrimages shall be by the shortest practicable route and for the shortest practicable time, to be designated by the Secretary of War. No mother or widow shall be provided

for at Government expense in Europe for a longer period than two weeks from the time of disembarkation in Europe to the time of reembarkation in Europe, except in case of illness or other unavoidable cause. * * *. In the case of any mother or widow willfully failing to continue the pilgrimage of her particular group, the United States shall not incur or be subject to any expense with regard to her pilgrimage after such failure."

Section 3 of the 1929 Act authorized an appropriation of such sums as might be necessary to carry into effect the provisions of the act and directed the Secretary of War to make an investigation for the purpose of determining (1) the total numbers of mothers and widows entitled to make the pilgrimages, (2) the number of such mothers and widows who desire to make the pilgrimages and the number who desire to make the pilgrimages during the calendar year 1930, and (3) the probable cost of the pilgrimages to be made. The Secretary of War was directed to report to Congress the result of such investigation not later than December 15, 1929. Subdivision (a) of section 3 inserted by the amendment of April 19, 1930, provided that "In carrying into effect the provisions of this Act the Secretary of War is authorized to do all things necessary to accomplish the purpose prescribed, by contract or otherwise, with or without advertising, * * *."

With respect to the transportation of white mothers and widows, it was agreed between plaintiff and the Quartermaster General, acting for the Secretary of War, among other things, that (a) Cabin accommodations should be provided on plaintiff's vessels "at tariff rates for the accommodations occupied east- and west-bound"; (b) payment for transportation should be made on Government Transportation Order when east- and west-bound tickets for each sailing were issued by plaintiff and turned over to defendant's designated representative; and (c) six weeks before each sailing plaintiff was to be advised of the definite number of pilgrims to be carried and of the space remaining on the east- and west-bound trips which could be released for sale by plaintiff to the public.

Plaintiff's proof shows that tickets issued by it for pilgrimages of the Gold Star Mothers and Widows to Europe and return were issued to each passenger in the same way as round-trip tickets were issued to the public. The tickets for the round trip of each of the mothers and widows on each sailing were issued by plaintiff at the same time on Government transportation requests—the east-bound tickets being retained by plaintiff and the west-bound tickets delivered to defendant for holding by defendant's contact officer on each vessel for use of the pilgrims on the return west-bound voyage. All of the voyages by the Gold Star Mothers and Widows were round-trip voyages and were so understood by the parties.

Plaintiff's tariff in effect during 1931 set forth the rates for one-way fares, east- and west-bound during the summer, or "high-season," and during the "off-season." Plaintiff's tariff also provided as follows:

> Round trip rates apply during "off-season"—East-bound, July 16th to May 15th, inclusive; West-bound, Oct. 1st to July 31st, inclusive. Round trip rates for berths above, minimum is made by deducting 12% from combined East-bound and West-bound fares.

Plaintiff contends that under the language of item 1 of the agreement of the parties dated March 29, 1930 (finding 17), whereby plaintiff agreed "to provide Cabin accommodations in the number and on the vessels indicated on the attached list at tariff rates for the accommodations occupied east- and west-bound," the discount of 12 percent for any round trip or one-way trip in "off-season" was not applicable to the transportation of Gold Star Mothers and Widows, and that the government erroneously deducted and retained $76,979.28 from the total of the full-face tariff rates east- and west-bound for the stateroom accommodations occupied east- and west-bound by the Gold Star Mothers and Widows.

In the alternative, plaintiff contends that if the court should conclude that the government is entitled to a discount it should hold that such discount is restricted under the agreement, the tariff, and the Conference Agreement

(finding 26) of the Trans-Atlantic Passenger Conference to 12 percent of the combined one-way fares on round trips made in "off-season" and give plaintiff judgment for $59,016.48, which is the discount taken by defendant from the full one-way tariff rates on one-way travel in the "off-season" period.

Finding 37 shows that of the total amount of $77,209.86 originally deducted by defendant from plaintiff's bills at full-face tariff rates, east- and west-bound, the sum of $17,953.80 represented 12 percent of combined one-way fares east- and west-bound where the round trip was made in the "off-season," and the balance of $59,954.46 of the total sum deducted represented 12 percent of the one-way portions of full-face tariff fares for trips made in "off-season" by those pilgrims who traveled one-way in "off-season" and one-way in "high-season." The defendant subsequently refunded $928.98 deducted on account of "off-season" travel of Colored Mothers and Widows on the American Merchant Line. The deduction here involved is, therefore, $76,979.28.

As shown by finding 26, the Conference Agreement of the Trans-Atlantic Passenger Conference (Minutes of Meeting No. 4, March 28, 1929) provided for a reduction of 10 percent (made 12 percent for 1930) of the combined one-way tariff fares for round-trip travel during the "off-season", and the same minutes provided that "If round-trip ticket is issued at the outset and passenger travels one way during the off season and one way during the summer season, the reduction of 10% will be allowed on the off season one-way fare." The language of the Agreement of March 29, 1930, between plaintiff and defendant that plaintiff would provide cabin accommodations at tariff rates for the accommodations occupied east- and west-bound is consistent with the above-quoted discount provisions in the 1930 tariff and the Conference Agreement of the Trans-Atlantic Passenger Conference which provided for the discount taken by the government. There is no evidence to indicate that the language of the Agreement of March 29 just referred to was intended or understood by both parties to the Agreement to exclude the 12 percent dis-

count, as deducted from full tariff rates, from being claimed by the government. The pilgrimages of the Gold Star Mothers and Widows were made round trips by the act under which the Agreement was made. Both parties understood that each pilgrim was to make the round trip, and round-trip tickets were issued and were usually paid for in each case before the east-bound sailing. In every instance the official government transportation requests, which were the equivalent of cash, were issued for the round-trip tickets before the east-bound sailing. In addition to what has just been said, there is evidence to show that in the negotiations on and after June 7, 1929, which culminated in the Agreement of March 29, 1930, the government intended, even if plaintiff did not, that the rates to be paid for the voyages to Europe and return were to be tariff rates, and it is admitted by plaintiff that the term "tariff rates," without more, means the one-way fares shown on the tariff less the discount provided therein for "off-season" travel. So far as the evidence shows the only occasions on which the matter of tariff rates and the discount for "off-season" travel were mentioned in the negotiations were, first, in plaintiff's original proposition of June 19, 1929 (finding 4), in the fourth paragraph of which it called the Quartermaster General's attention to the fact that if the transportation of Gold Star Mothers and Widows could be provided in what is termed "off-season" a ten percent reduction, in effect at that time, for round trips in "off-season" would be available, and, in the fifth paragraph, that if travel was one-way in "off-season" and one-way at the height of the season the 10 percent reduction would be applicable on one-half of the fare; and second, in the eighth paragraph of this proposal the plaintiff, after setting forth the cabin fares in paragraph 7, advised the Quartermaster General that the fares quoted were the gross fares and that if the movement should be in "off-season" the 10 percent reduction could be made; and, third, in the letter of March 18, 1930, from Colonel Gibson, acting for the Quartermaster General, in which he advised plaintiff that as had previously been explained "No official of the Government has the authority to enter into

any contract which would commit the Government to the payment of higher rates than those charged the general public." There was thereafter no further mention of the matter of the discount.

Under the terms of the Agreement of March 29, 1930, and plaintiff's tariff, we are of opinion that the Government was and is entitled to the full amount of the discount of $76,979.28 taken in making final payment for transportation of white Gold Star Mothers and Widows.

Plaintiff makes the further contention that the Government is estopped under the rule of equitable estoppel from insisting upon the discount for travel during "off season" by reason of the approval and payment of certain vouchers submitted by plaintiff, accompanied by lists of passengers and rates, at full-face tariff fares, without discount, and the waiver by plaintiff on May 26, 1930, in reliance upon that practice of its right to insist upon stateroom-capacity fares for the entire season of the 1930 pilgrimages. We find no basis in the evidence for holding that defendant is estopped to claim the discount in question. The Quartermaster General was the only officer authorized to bind the United States by contract, or conduct amounting to implied acquiescence, and the evidence fails to show that the Quartermaster General ever expressly or impliedly interpreted the Agreement of March 29, 1930, as providing that plaintiff was entitled to full-face tariff rates without discount for "off season" round trip or one-way travel prior or subsequent to May 15 or May 26, 1930, when plaintiff agreed to waive charges on the basis of capacity-occupancy of staterooms, and to charge only the three-in-a-room rate where three people occupied a four-berth room, or the two-in-a-room rate where two mothers or widows occupied a three- or four-berth room. Moreover the evidence shows that at the conference between plaintiff and the Quartermaster General on May 15, as a result of which plaintiff's letter of May 26 was written, the Quartermaster General advised plaintiff that he desired the maximum possible number of lower berths be assigned for use of mothers and widows and that he was willing to pay full-fare capacity for each room, even

if four-berth rooms were occupied by only two mothers. Plaintiff's waiver of its right to charge capacity-fares for staterooms, whether occupied to capacity or not, was purely voluntary.

Plaintiff is not entitled to recover and the petition must be dismissed.

ON DEFENDANT'S COUNTERCLAIM

The defendant has filed a counterclaim in which it seeks to recover from plaintiff, as a hold-over lessee, the amount of $35,014.80 as rent for certain space in a building owned by the government at 45 Broadway, New York, for the period January 1 to June 6, 1932, inclusive, with interest.

Plaintiff was a hold-over tenant under an annual contract of lease with the defendant which expired at midnight on June 6, 1931.

The defendant contends that plaintiff by holding over and continuing to occupy the premises after expiration of the lease without written renewal thereof, or modification as to rental, by the parties, became, under the law of New York, a tenant for another year and, as such hold-over tenant, is liable for the rent for another year, beginning June 7, 1931, in the amount stipulated in the original lease agreement and the expired extension thereof.

Plaintiff insists that it is not liable for any portion of the amount claimed by defendant for the reason that in the circumstances it became a tenant at will, or a tenant from month to month, and that the full monthly proportion of the annual rental stipulated in the original lease and extension of June 6, 1930, for one year, was paid monthly to December 31, 1931. Plaintiff vacated the premises December 8, 1931.

The rule relating to landlord and tenant is that if a tenant holds over after expiration of a lease for a definite term under circumstances showing its willingness to continue the existing arrangement and if the lessor accepts rent, thus consenting to continued occupancy without indicating that he contemplates a change in terms, the continued relationship is consensual, and the tenant will be regarded as a tenant for

another term according to the circumstances of the previous tenancy. *Raymond Commerce Corporation* v. *United States*, 93 C. Cls. 698. Under such circumstances an agreement implied in fact arises. In the present case, however, as disclosed by the findings, that was not the situation which existed between the Fleet Corporation and plaintiff. Between January and October 30, 1931, a reorganization of United States Lines, Inc., the parent and owner of all the capital stock of plaintiff, was in process between the United States and the officers and directors of United States Lines, Inc., and plaintiff, which reorganization, as shown by the findings, of necessity included the affairs and obligations of plaintiff as the operating company of the ships of United States Lines, Inc., which had been purchased from the United States through the Fleet Corporation in 1929. While it is true that plaintiff as a corporation was not expressly made a party to the reorganization agreement of October 30, 1931, nevertheless its officers and directors were officers and directors of United States Lines, Inc., and, as the operating company of the vessels belonging to United States Lines, Inc., its business, affairs, and obligations were inseparably bound up with those of United States Lines, Inc., and became a part of the reorganization under the terms and conditions of the agreement between United States Lines Company, the new company, and the Fleet Corporation. The facts disclose that it was for these reasons that plaintiff did not sign the renewal lease for the year beginning June 7, 1931, proposed by the Fleet Corporation upon expiration of the prior lease of June 6, 1930, although prior thereto, on May 19, 1931, the vice president of plaintiff had requested the Fleet Corporation by letter to consent to renewal of lease by plaintiff for another year. No action had been taken on May 19 by plaintiff's directors concerning a renewal lease.

As set forth in the findings, plaintiff, upon being asked by Assistant General Counsel Skinner of the Fleet Corporation why it had not signed the renewal lease for another year beginning June 7, 1931, advised him in August 1931 that such renewal lease was not signed because of the pending reorganization. Assistant General Counsel Skinner was the

representative of the Fleet Corporation in charge of preparation of contracts and leases, and was also in charge of the preparation of the reorganization agreement which was subsequently signed by the Fleet Corporation on October 30, 1931. Nothing further was done or said by the Fleet Corporation or plaintiff after August 1931 concerning occupancy by plaintiff of the premises in question until the reorganization agreement of October 30, 1931, between the United States, represented by the Fleet Corporation, and the United States Lines Company was signed. Between June 6 and October 30, 1931, the status of plaintiff as a tenant was not clear, but under the terms of the reorganization agreement it seems clear that plaintiff became, with defendant's consent, a month-to-month tenant, which, as the facts disclose, was the first consensual arrangement concerning plaintiff's tenancy that was had between anyone representing or acting for plaintiff and the Fleet Corporation. The United States Lines, Inc., represented by its officers and directors, was a party to the reorganization, and these officers and directors were also officers of plaintiff. When plaintiff held over after June 6, 1931, the Fleet Corporation had the right, if it so desired, to treat plaintiff as a tenant for another annual term under the previous lease, but the evidence submitted by defendant is not sufficient to show that the Fleet Corporation did this, or that it intended to do so. The circumstances which existed and the conversations between officers and representatives of plaintiff and the Assistant General Counsel of the Fleet Corporation in August 1931 were such as not to show an agreement implied in fact, prior to or at that time, that plaintiff was a hold-over tenant for another year from June 6, 1931.

Counsel for defendant argues that the defendant is not bound by statements as to the terms and conditions of plaintiff's tenancy as set forth in Exhibit III to the balance sheet prepared by Price, Waterhouse & Co., which was annexed to and became a part of the reorganization agreement as Schedule A, because neither the president nor the assistant general counsel of the Fleet Corporation read that exhibit. We think it is immaterial to the question here whether they did or did not read it; they knew that the balance sheet, of

which Exhibit III was expressly made a part, was attached to the agreement and constituted a part thereof. They read the balance sheet and this balance sheet expressly made Exhibit III a part of it. Exhibit III stated, among other things, with reference to the lease which expired on June 6, 1931, and plaintiff's tenancy, as follows: "Term—month to month basis. Lease terminated June 6, 1931, not renewed but continued on a month to month basis." The reorganization agreement as signed, which was certainly read by the Fleet Corporation for it prepared it, made the audit, including the balance sheet and the schedules, including Exhibit III, thereto attached, a part of the terms and conditions of the reorganization agreement. The defendant cannot now escape its effect.

Whatever may have been the nature of plaintiff's tenancy between June 6 and October 30, 1931, it was a month to month tenancy on and after the last-mentioned date. Plaintiff's officers and directors had on October 23, 1931, accepted the terms and conditions of the reorganization agreement, including the Price, Waterhouse & Co., audit as proposed by the United States Lines Company of Nevada. Plaintiff, by remaining in possession after June 6 and until the reorganization agreement was signed on October 30, 1931, was not a trespasser; to say that it was a trespasser after June 6 is to disregard the relevant circumstances.

The defendant is not entitled to recover of plaintiff rental for premises at 45 Broadway, New York, for the full period January 1 to June 6, 1932, but inasmuch as plaintiff's tenancy when it vacated the premises in December 1931 and paid the rent to December 31, 1931, was a tenancy from month to month, plaintiff was entitled to vacate the premises at the end of any month upon giving defendant thirty days notice of its intention to do so. The defendant was entitled to thirty days notice. *Hand* v. *Knaul*, 116 Miscl. 714, 191 N. Y. S. 667. Plaintiff did not give this notice and defendant is entitled to recover the agreed rental of $6,762.75 for the period January 1 to January 31, 1932.

Defendant is entitled to recover on its counterclaim, and judgment for $6,762.75 will be entered in its favor against plaintiff with interest thereon at 6 per centum per annum

from January 1, 1932, the date on which the rent was due and payable, until paid. Defendant is entitled to claim interest. *Billings* v. *United States*, 232 U. S. 261.

Plaintiff's petition is dismissed, and judgment is rendered against plaintiff and in favor of the government on its counterclaim for $6,762.75 with interest at 6 per centum per annum, as above stated. It is so ordered.

Madden, *Judge;* Whitaker, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

On plaintiff's motion for new trial (overruled October 4, 1943) Judge Madden was of the opinion that the case should be remanded for the taking of further testimony.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1943, to September 30, 1943

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 45541. April 5, 1943

James G. DeBevoise, Individually, and John Edwin King, executor of Ira L. Terry, deceased.

Judgment in favor of James G. DeBevoise, one of the plaintiffs, and against the United States, defendant, in the sum of $4,500, in full payment for all services in making appraisal in or about the year 1935 of properties in Queens County, New York, in connection with the then contemplated low cost housing project known as Hollet's Cove Housing Project; defendant's counterclaim against John Edwin King as executor and the petition as to said King's claim dismissed.

No. K-336. May 3, 1943

The Chickasaw Nation v. *The United States And The Choctaw Nation.*

Indian claims; allotments to freedmen of the Choctaw Nation from tribal lands held in common by the Choctaw Nation and the Chickasaw Nation; treaty of 1866; "supplemental agreement" of 1902. Plaintiff entitled to recover against the defendant, the Choctaw Nation, but the determination of the amount of recovery reserved for further proceedings (Rule 39a). Opinion 95 C. Cls. 192.

Reversed by the Supreme Court March 8, 1943; 318 U. S. 423; 97 C. Cls. 731.

In accordance with the mandate of the Supreme Court, reversing the decision of the Court of Claims, and remand-

ing the case "with instructions to dismiss the petition," the petition was dismissed.

No. 45531. MAY 3, 1943

Pugent Sound Bridge & Dredging Company.

Claim for increased costs in connection with contract for dredging the Columbia River.

Upon a stipulation by the parties and report from the commissioner of the court recommending that judgment be entered in favor of plaintiff in the sum of $36,887.48, and on plaintiff's motion for judgment, which was allowed, judgment for plaintiff was entered for $36,887.48.

No. 45296. JUNE 7, 1943

J. L. Simmons Company

Government contract, construction of post office.

Upon a stipulation filed by the parties and upon a report from a commissioner of the court recommending judgment in the sum named therein; and upon plaintiff's motion for judgment, to which the defendant filed no objection, judgment for the plaintiff was entered in the amount of $1,407.86.

No. 45694. JUNE 7, 1943

Great Lakes Construction Company.

Government contract; construction of post office.

Upon a stipulation filed by the parties and upon a report from a commissioner of the court recommending judgment in the sum name therein; and upon plaintiff's motion for judgment; to which the defendant filed no objection, judgment for the plaintiff was entered in the amount of $10,000.00.

REFUND OF NAVIGATION FEES

Upon stipulations filed by the several plaintiffs and by the defendant in each case, and upon a report of the commissioner of the court to whom the cases had been severally referred recommending that judgment be entered in favor of the plaintiffs in the respective amounts stated in the stipulations,

it was ordered that judgment be entered in favor of the respective plaintiffs as follows:

ON JUNE 7, 1943

No. 43576.	Border Line Transportation Company	$328.37
No. 43577.	Island Tug & Barge Company Limited	182.91
No. 43578.	Frank Waterhouse & Company of Canada Ltd	209.67
No. 43584.	Coastwise Steamship & Barge Company, Ltd	102.70
No. 43585.	James Griffiths & Sons, Inc	26.42
No. 43586.	Pacific (Coyle) Navigation Co., Limited	38.86
No. 43587.	Wagner Tug Boat Company	11.39
No. 43610.	Coastwise Steamship & Barge Co., Inc	50.01
No. 43611.	Victoria Tug Company Limited	40.43
No. 43628.	Donaldson Brothers, Ltd	408.00
No. 43629.	Standard Oil Company of California	18.41
No. 43630.	Winslow Marine Railway & Shipbuilding Company, Inc	38.19
No. 43649.	Horace X. Baxter Steamship Co	8.04
No. 43650.	Coast Steamship Company (1922) Limited	288.27
No. 43752.	Westfal-Larsen Co., A/S	440.48
No. 43753.	William Whitworth and C. D. Vincent, copartners, doing business under the firm name and style of Bervin Steamship Company	74.10

ON JUNE 10, 1943

No. 43614.	Kokusai Kisen Kaisha	$194.01
No. 43615.	Mitsui & Company, Ltd	323.74
No. 43631.	States Steamship Company	256.43
No. 43635.	Oceanic & Oriental Navigation Co	201.73

JUDGMENTS ENTERED UNDER ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197), and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON FEBRUARY 1, 1943

No. 44336.	Warner Company	$1,663.54

ON APRIL 5, 1943

No. 44246.	Delta Finishing Co	$2,009.06
No. 44247.	Delta Finishing Co	369.47
No. 44250.	Summerdale Dyeing & Finishing Works, Inc	154.11
No. 44262.	John Campbell, Receiver	16.24
No. 44278.	Hydraulic Press Brick Co	1,626.65
No. 44366.	Hydraulic Press Brick Co	3,364.47
No. 44390.	The Baldwin Company	461.64

ON MAY 3, 1943

No. 44053.	The Globe-Wernicke Company	$2,622.42
No. 44211.	Northeastern Piping & Construction Corporation	6,985.82
No. 44251.	Grosvenor-Dale Company	6,101.23
No. 44361.	The E. F. Hauserman Company	34,715.79
No. 44409.	S. M. Rodelfinger, Trading as Rodelfinger Bros	1,293.13

ON JUNE 7, 1943

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45666. James Killian.
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45736. Laura O. Lewis et al.
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45185. Appalachian Electric Power Company.

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, PETITIONER, v. THE UNITED STATES

[Supreme Court No. 369]

THE UNITED STATES, PETITIONER, v. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA

[Supreme Court No. 373]

[Court of Claims No. 33642]

[*Ante*, page 1; 320 U. S. —]

On writs of certiorari (317 U. S. 620) to review judgments of the Court of Claims on suit brought by the Marconi Wireless Telegraph Company of America to recover damages for infringement of four United States patents. (See page 1, *ante;* 81 C. Cls. 671.)

To review adverse parts of the judgments, both parties brought certiorari.

The judgment of the Court of Claims was, on June 21, 1943, vacated in part and affirmed in part (320 U. S. —; 63 S. C. R., 1393); and the cause remanded to the Court of Claims for further proceedings not inconsistent with the opinion of the Supreme Court, which held:

In reviewing judgment of the Court of Claims in patent infringement action, the Supreme Court in the exercise of its appellate power is not precluded from looking at any evidence of record, which, whether or not called to the attention of the Court of Claims, was relevant to and might affect correctness of decision of such court sustaining or denying any contention which a

party has made before it (Act of May 22, 1939, 53 Stat. 752; 28 U. S. Code, sect. 288b).

A decision of the Court of Claims holding patent claim valid and infringed was appealable, but was not final until conclusion of accounting, and the Court of Claims had power at any time prior to entry of final judgment to reconsider any portion of its decision and to reopen any part of case (Judicial Code, section 129; 28 U. S. Code, sections 227a, 288b).

Where two alleged anticipatory patents were not urged before the Court of Claims until after judgment holding patent claim valid and ordering accounting, and the court stated, when such patents were urged, that question of infringement was not before it on accounting, failing to indicate whether the court had properly exercised its discretion or thought it lacked power to reopen case, judgment is vacated and case remanded for further consideration of question of validity (Judicial Code, section 129; 28 U. S. Code, sections 227a, 288b).

A patentee's specifications, which taken in their entirety, are merely descriptive or illustrative of his invention, will not be read as though they were claims whose function is to exclude from patent all not specifically claimed.

Merely making a known element of a known combination adjustable by a means of adjustment known to the art, when no new or unexpected result is obtained, is not invention.

Ordinarily, the court is slow to recognize amendments of a patent application made after filing of another application and disclosing features shown in that application.

Patent No. 763,772, all claims other than claim 16, for improvements in apparatus for wireless telegraphy by means of Hertzian oscillations or electrical waves, is invalid for anticipation.

As between two inventors, priority of invention will be awarded to the one who by satisfying proof can show that he first conceived of the invention.

Commercial success achieved by later inventor and patentee cannot save his patent from defense of anticipation by a prior inventor.

To obtain benefit of prior conception, inventor must not abandon invention, but must proceed with diligence to reduce it to practice.

Patent No. 803,684, for an instrument for converting alternating electric currents into continuous currents, is invalid because patentee's claim for more than he had

invented was not inadvertent and his delay in making disclaimer until 25 years after publication of invention and 10 years after patent is unreasonable (35 U. S. Code, sections 31, 69).

The purpose of the rule that patent is invalid in its entirety if any part of it be invalid is protection of public from threat of invalid patent.

The purpose of patent disclaimer statute (35 U. S. Code 65, 71) is to enable patentee to relieve himself from consequences of making invalid claims if he is able to show both that invalid claim was inadvertent and that disclaimer was made without unreasonable neglect or delay.

The right given by statute (35 U. S. Code 44, 71) to patentee or his assignees to sue for infringement on proper disclaimer does not relieve patentee from consequences of his failure to comply with statute because he acquired patent under assignment of application.

The opinion of the Supreme Court was delivered by Mr. Chief Justice Stone.

Mr. Justice Murphy took no part in the consideration or decision of this case.

Mr. Justice Frankfurter filed an opinion, dissenting in part, in which Mr. Justice Roberts joined.

Mr. Justice Rutledge filed an opinion, dissenting in part.

On October 11, 1943, petition for rehearing was denied by the Supreme Court. (320 U. S. —).

THE INDIANS OF CALIFORNIA, CLAIMANTS, BY U. S. WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA v. THE UNITED STATES

[No. K-344]

[98 C. Cls. 583; 319 U. S. —]

Indian claims; special jurisdiction act; treaties not ratified; title under Mexican law; use and occupancy; cession.

Decided October 5, 1942; claimants entitled to recover, subject, however, to offsets, if any, and amount of recovery and offsets, if any, to be determined under Rule 39 (a). Opinion 98 C. Cls. 583. Motion for new trial overruled January 4, 1943.

Plaintiffs' petition for writ of certiorari *denied* by the Supreme Court June 7, 1943.

ROBERT H. MEADE v. THE UNITED STATES

[No. 45181]

[98 C. Cls. 797; 319 U. S. —]

Pay and allowances; equalization act of 1922; inclusion of naval academy service; act of March 4, 1913.

Decided February 1, 1943; petition dismissed. Opinion 98 C. Cls. 797.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court June 7, 1943.

BEN WHITE ET AL. v. THE UNITED STATES

[No. 45710]

[98 C. Cls. 804; 319 U. S. —]

Jurisdiction; veto by the President; statute of limitation.

Decided February 1, 1943; demurrer sustained and petition dismissed. Opinion 98 C. Cls. 804.

Plaintiffs' petition for writ of certiorari *denied* by the Supreme Court June 7, 1943.

JOHN M. WHELAN & SONS, INC., v. THE UNITED STATES

[No. 44022]

[98 C. Cls. 601; 319 U. S. —]

Government contract; decision of contracting officer not arbitrary nor unreasonable; protest; appeal.

Decided October 5, 1942; petition dismissed; judgment for defendant on counterclaim. Motion for new trial overruled February 1, 1943. Opinion 98 C. Cls. 601.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court June 14, 1943.

INDEX DIGEST

CIVIL SERVICE RETIREMENT ACT.

I. A claimant under the Civil Service Retirement Act (U. S. Code, Title 5, chapter 14) has the right to maintain a suit under the Tucker Act (U. S. Code, Title 28, chapter 7, section 250) to review questions of law decided by the administrative tribunal. *Dismuke* v. *United States*, 297 U. S. 167. *Bayly*, 598.

II. Where the administrative officer is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized. *Dismuke* v. *United States*, 297 U. S. 167, and cases therein cited. *Id.*

III. The Court of Claims has jurisdiction to decide whether the determination of the Civil Service Commission as to the age of an applicant for retirement is sufficiently supported by evidence and reason to be immune from judicial reversal. *Id.*

IV. The court in reviewing the determination of an administrative officer does not make a new and independent determination of the facts but only examines the record which the administrative body had before it, to ascertain whether there was substantial evidence to support the findings made by that body or whether there was some denial of a fair hearing. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142, and cases therein cited; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105. *Id.*

V. In the instant case it is *held* that the deductions of the Civil Service Commission from such evidence as the Commission had before it as to the date of birth of plaintiff and his age at retirement were substantially supported by such evidence; and the plaintiff is not entitled to recover. *Id.*

CONTRACTS—Continued.

VI. Where the defendant substantially contributes to the failure or inability of a contractor to comply strictly with some contract provision, such provision as well as compliance therewith is waived. *Standard Steel Car Company* v. *United States*, 67 C. Cls. 445; *United States* v. *United Engineering and Contracting Co.*, 47 C. Cls. 489, affirmed 234 U. S. 236. *Id.*

VII. The contract in suit did not compel the plaintiff to appeal to the head of the department from a decision or conclusion of the contracting officer not in writing, or from a favorable decision or conclusion, or to appeal to enforce a favorable ruling. *Id.*

VIII. Contract providing that the price for cement should be adjusted in accordance with any change in freight rates on cement during life of contract did not include any increased freight rates on raw materials used in the manufacture of the cement. *Bessemer Limestone & Cement Co.*, 125.

IX. When the language of paragraph 1–10 of the specifications is construed in connection with the other provisions of the contract and specifications, and the conduct of the parties; it is clear that the parties had in mind at the time of making the contract only the freight rates on the cement. *Id.*

X. Where plaintiff entered into a contract with the Government, August 5, 1932, to do certain work in connection with the construction of the levee and navigation channel along the shores of Lake Okeechobee, Florida, including excavation; and where the specifications, profiles, and other data relating to the work covered by said contract indicated that only 10 percent of the material was rock and plaintiff's bid was made on that assumption; and where on December 18, 1933, after plaintiff had been engaged in the work for some time it protested that the proportion of rock was much larger than 10 percent and upon plaintiff's request new and more accurate borings were made which showed that the material in the area where plaintiff was then working and in which plaintiff continued to work until its contract was terminated was 40 percent rock

CONTRACTS—Continued.

XVI. The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained. *United States* v. *Behan*, 110 U. S. 338, 344. *Id.*

XVII. The Government can take from a contractor an enforceable agreement to perform his contract within a specified period or receive compensation ratably diminished according to a reasonable scale for late performance, even if no actual damages are or can be proved. *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 659; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118, cited. *Lebanon Woolen Mills, Inc.*, 318.

XVIII. Time for delivery of goods under Government contract began to run from August 12, 1935, the date of the contract, where contractor had prior to August 12 received notice to proceed which stated that formal contract would be executed later but would be dated as of August 12. *Id.*

XIX. Difficulties with reference to the dyeing and weaving of Army blankets were not "unforeseeable difficulties" to a contractor, manufacturer, who knew that the work was new to it, and would have to be started with the help of experts. *Id.*

XX. Where the dates set for delivery of each installment of goods by contractor fell on Saturdays but the Form of Bid, which was a part of the contract, gave notice that the Government depot where the goods were to be delivered would not be open on Saturdays or Sundays and that no deliveries would be accepted there on those days; the contractor was not in default in his deliveries until the Mondays following the Saturdays on which deliveries would have been due but for this notice, and the number of days of default for each delivery is computed from Monday, rather than from Saturday. *Id.*

XXI. Where contract provides that radiation to be furnished shall be measured on the basis of Bureau of Standards measurements and not according to catalogue ratings, Bureau of Standards measurements govern, even though this might be incorrect basis of measurement, and plaintiff is not entitled to recover on basis of catalogue ratings. *Thos. Somerville Company*, 329.

CONTRACTS—Continued.

prosecution of the original contract work in making a decision with reference to any of the changes considered or ordered by the defendant. *Magoba Construction Co., Inc.*, 662.

XLV. The Government cannot be held liable in damages for delay in completion of the original work called for by a construction contract, unless the Government abused its privilege to make changes or otherwise unreasonably delayed the prosecution of the work in such a way and under such circumstances as to constitute a breach of some express or implied provision of the contract. *Id.*

XLVI. It is *held* that the evidence adduced does not establish, in view of the provisions of the contract with plaintiff and the concomitant contract with another contractor, that the defendant breached its contract with the plaintiff. *Hunter Steel Company*, 692.

XLVII. The proof is not sufficient to show that the defendant breached any provision of the contract with plaintiff by failure of the contracting officer to require another contractor to perform its work in sequence more convenient to plaintiff. *Id.*

XLVIII. It is not established, or alleged, that the contracting officer acted arbitrarily or failed to exercise an honest judgment with regard to the question of how and in what order another contractor and plaintiff should proceed with their work. *Id.*

XLIX. Where plaintiff made no protest to the contracting officer that it was being unreasonably delayed and (except in one instance) made no claim to the contracting officer for any extra cost or unnecessary work or expense not contemplated by its contract; it is *held* that plaintiff is not entitled to recover. *Id.*

L. In the one instance in which plaintiff made complaint as to delay on account of the sequence in which another contractor prosecuted its work, plaintiff's proof is not sufficient to show that the failure of the contracting officer to order and require the other contractor to carry on its work in an order of precedence different from that in which it was carried on was unreasonable and arbitrary. *Id.*

PATENTS—Continued.

for an accounting, in accordance with said opinion; it is *held* that the plaintiff is entitled to recover as just and reasonable compensation 10 percent of the entire market value of the apparatus acquired during the accounting period, together with an amount measured by interest at 5 percent per annum, not as interest but as a part of the entire just compensation, on said 10 percent from August 16, 1915, to date of payment of the judgment. *Marconi Wireless Telegraph Company*, 1.*

II. The status of a patent in the art with which it is associated is of importance in determining the base which is to be used in accounting. *Garretson* v. *Clark*, 111 U. S. 120, cited. *Id.*

III. The ability to tune *selectively* and *adjustably* the antenna of any receiving station to any desired transmitting station, to which the Lodge patent relates, was of fundamental importance to radio communication. *Id.*

IV. While the Lodge invention dealt primarily with tuning, the invention was of such paramount importance that it substantially created the value of the component parts utilized in the radio transmitters and receivers purchased or acquired by the United States during the accounting period, and accordingly comes within the rule basing compensation for infringement upon the entire market value of the article of which the patented feature is a component part. *Id.*

V. The courts look with favor upon the establishment of a reasonable royalty as a measure of compensation in a patent accounting. *Id.*

VI. If the patentee has already established a royalty by a license or licenses, he has himself fixed the average of his compensation. *Id.*

VII. Where no such license standard has been fixed, the courts will take into consideration any act or acts of the patentee in connection with third parties which would tend to indicate an accepted monetary value for use of the patentee's invention. *Id.*

VIII. Testimony of expert witnesses, more or less familiar with the establishment of royalty rates in any particular art, may be taken into consideration in determining compensation for infringement. *Id.*

*Affirmed in part and reversed in part. See page 815, *ante*.

PATENTS—Continued.

IX. With respect to the radio equipment in the instant case acquired prior to the period of accounting defendant undoubtedly has a right, under the patent law as interpreted by the courts, to repair a system but not to reconstruct a system; and the installation of a new receiver would amount to such reconstruction. *Id.*

X. The general theory relating to spare parts is in substance that the user of a patented machine or device, having once paid the patentee a royalty or other consideration for the right to the free use and enjoyment of such machine or device, is thereafter entitled to keep the machine or device in repair and to replace broken or worn-out unpatented parts of its mechanism with a corresponding part not necessarily purchased from the patentee. *Id.*

XI. The ultimate question is one of "repair" versus "reconstruction" and its practical determination to a large extent rests on the purpose for which the parts were intended. *Id.*

XII. In an accounting for determination of compensation for infringement, while it is the duty of plaintiff to present *prima facie* evidence of the number of infringed devices and their monetary value, the evidence upon which plaintiff is forced to rely for this purpose is usually in the form of records and documents in the possession of the defendant, and this is especially true where the devices have been acquired by the infringer from third parties, as in the instant case. *Id.*

XIII. Where confusion in the books or records of the defendant is found, or where profits from the infringing device have been commingled with other profits of the defendant, it is obviously impossible for the plaintiff to proceed beyond a certain point in its *prima facie* proof, and one party or the other must suffer. *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 621, cited. *Id.*

XIV. Under the decision of the Supreme Court in the the case of *Esnault-Pelterie*, infringement is a question of fact rather than a question of law. (See *United States* v. *Esnault-Pelterie*, 299 U. S. 201, remanding the case to the Court of Claims for "specific findings whether plaintiff's patent in suit was valid, and, if found valid, whether

PATENTS—Continued.

it was infringed by the defendant"; and amended findings and new interlocutory judgment, 84 C. Cls. 625; affirmed 303 U. S. 26.) *Id.*

XV. Upon the basis of the special findings of fact and the opinion of the Court of Claims in the instant case, filed November 4, 1935 (81 C. Cls. 671), in which it was held that the Marconi patent #763,772 was valid as to claim 16, and had been infringed by the United States; and upon the showing made in the hearing for an accounting, in accordance with said opinion; it is *held* that the plaintiff is entitled to recover 65 percent of the total monetary value of the utility and advantages to the Government, as reasonable and entire compensation, together with interest at 5 percent on said amount, not as interest but as a part of the just compensation; said interest to be calculated in accordance with the periods and amounts specified in the findings. *Id.*

XVI. Where, upon a stipulation that the accounting be deferred until validity and infringement had been determined, the Court of Claims in its previous decision in the instant case (81 C. Cls. 671), in its conclusion of law, held that the Marconi patent #763,772 was invalid except as to claim 16 thereof, which was held to be infringed; and where the correctness or the sufficiency of the court's findings or conclusions was not questioned by the defendant, by a motion for new trial or otherwise; it is *held* that the question of infringement of Marconi claim 16 by the apparatus described in the findings of the prior decision is not before the court in the present accounting. *Id.*

XVII. Where in an order, October 22, 1937, the court overruled defendant's motion for reconsideration of the court's allowance of plaintiff's motions for calls, and in said order stated the "claims which have been held valid and infringed are subject to proof before the Commissioner"; it is *held* that by such order the question of infringement of claim 16 was not reopened. *Id.*

XVIII. Where 10 receivers held to infringe claim 16 of the Marconi patent were located and used at the United States Naval Radio Station at the United States Legation in Peking, China,

PATENTS—Continued.

plus interest at 5 percent per annum for the accounting period, not as interest but as a part of just compensation. *Id.*

XXIV. Transmitters, such as were used by the defendant during the accounting period, were old in the art at the time of issuance of the patents in suit, and the novel and patentable features covered by the patents in suit are limited by the doctrine announced by the Supreme Court in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, to apparatus for and method of receiving wireless communications. *Id.*

XXV. Fessenden patents 1,050,441 and 1,050,728, relating respectively to apparatus for and a method of radio communication, held valid and infringed by the Government, under the decision of March 13, 1933, 77 C. Cls. 87. *National Electric Signaling Co., No. 34664*, 646.

XXVI. Where Government used at its wireless telegraph station, without owner's consent, patents covering inventions relating to structure and method of transmitting electric signals, a proper measure of reasonable and entire compensation to which owner of patent is entitled is a reasonable royalty based on cost to the Government of radio receivers embodying patented inventions. *Id.*

XXVII. Upon all the evidence adduced upon accounting and in view of the basic or pioneer character of the heterodyne inventions covered by the patents in question, and their value and importance in the related art; it is *held* that a reasonable royalty for the use of the receiving sets involved in the instant case is 18 percent of the cost of the sets where the sets were used entirely for heterodyne reception, plus interest at 5 percent per annum, not as interest but as a part of the entire or just compensation. *Id.*

PAY AND ALLOWANCES.

I. Where plaintiff, an unmarried officer in the U. S. Army, on active duty with the Civilian Conservation Corps from September 14, 1936, to September 13, 1937, inclusive, was assigned as quarters one room in a frame barracks which were shared by other officers and forestry foremen and which were the only quarters available; and where during the said period plaintiff's mother, a widow, was dependent upon him for

TAXES—Continued.

Income Tax—Continued.

years 1930, 1931, and 1932 filed income-tax returns showing gross income from all sources and gross income from sources within the United States; the Commissioner of Internal Revenue properly determined income subject to Federal income tax by limiting deduction for British income taxes paid to an amount not in excess of that resulting by applying the British tax rate to the taxable income of the corporation from sources within the United States. *Union Assurance Society, Ltd.*, 218.

II. (2) Under section 119 of the statute (45 Stat. 791), which provides that from the gross income from sources within the United States "there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto," the use of the word "properly" imports some discretion and flexibilty in the rules and regulations which were to be prescribed by the Commissioner of Internal Revenue. *Id.*

III. (3) *London & Lancashire Insurance Co.* v. *Commissioner*, 34 B. T. A. 295, 298, cited. *See also Universal Winding Co.* v. *Commissioner*, 39 B. T. A. 962. *Third Scottish American Trust Co.* v. *United States*, 93 C. Cls. 160, distinguished. *Id.*

IV. (4) Gain or loss from sale of declaration of taxpayer's interest in security company in dissolution may not be ascertained for tax-return purposes until sale of stock in bank to which taxpayer's interest in security company was locked by trust agreement at the time of purchase. *Pierce*, 355.

V. (5) Where bank stock carried with it ratable interest in investment company dealing in securities that were unlawful for banks; and where bank's officers and directors held all outstanding investment company shares as trustees for each bank shareholder; and where, pursuant to the Bank Act of 1933 (48 Stat. 162), separation of bank and investment company was effected, and each shareholder upon dissolution of investment company received ratably "declarations of interest" in said company; bank shareholder's interest in investment company was not so separate from his holding of shares in

TAXES—Continued.
Income Tax—Continued.

practice made by the Commissioner, which changed practice was subsequently sustained by the courts as in conformity with the applicable statute; it is *held* that the Commissioner's method of computing the foreign tax credit, as approved by the courts, must be followed in all cases to which the statute applies, whether the year in question was before or after the change in practice. *Helvering* v. *Reynolds*, 313 U. S. 428, cited; *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, distinguished. *Id.*

XIII. (13) The Commissioner of Internal Revenue has power to make regulations which have the force and effect of law if they are within the general scope of the tax statute and are addressed to and reasonably adapted to its enforcement but the Commissioner has no power to extend or limit a statute or modify its meaning. *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571, and other cases cited. *Id.*

XIV. (14) An interpretative regulation construing a tax statute has validity only if correct. *United States* v. *Harrison Johnston*, 124 U. S. 236, and other cases cited. *Id.*

XV. (15) Where during the years involved in the instant case there was no regulation governing the computation of the credit for foreign taxes; and where only the income tax forms provided for the computation of such credit according to the method followed by plaintiff and such had been the administrative practice; and where there is nothing to show that Congress had knowledge of these facts when in 1928 Congress reenacted the applicable portion of the 1926 Revenue Act; it is *held* there is no presumption that Congress knew of such practice and approved it, since such presumption does not arise unless the practice has been long continued. *Higgins* v. *Commissioner*, 312 U. S. 212. *Id.*

XVI. (16) Congress may be said to know legislatively of the regulations promulgated under prior acts but it is not charged with knowledge of the many forms issued from time to time and of unpublished methods of computation, especially when they have existed for only a brief period. *Id.*

TAXES—Continued.

Income Tax—Continued.

XVII. (17) A claim for refund which fails to give to the Commissioner notice of the nature of the claim for which suit is to be brought and refers to no facts upon which such suit may be founded does not satisfy the conditions of the statute (Internal Revenue Code, section 3772). *United States* v. *Felt & Tarrant*, 283 U. S. 269, cited. *Stewart, Executrix*, 585.

XVIII. (18) The filing of a claim for refund is an indispensable prerequisite to a suit to recover taxes, under the provisions of the statute (Internal Revenue Code, section 3772), and the claim for refund specified by that provision relates to the claim which may be asserted in a subsequent suit. *Id.*

XIX. (19) Where in the instant case the general statement "installment obligations constituted capital" was contained in a claim for refund without any allegation of facts upon which such general statement was founded and without anything which would suggest the nature of the claim as consistent with the claim in suit; it is *held* that such allegations are not adequate to support the basis of the instant suit. *Id.*

XX. (20) Where the principal purpose of plaintiff's claim for refund was to dispute what appeared to be double taxation of decedent's assets at the date of her death, that is, including the value of installment obligations in decedent's gross estate as a part of the corpus for estate tax and also including the value of the same assets in decedent's gross income in her final income tax return; and where the profit from the installment sale in question had been previously determined by the Commissioner, during the life of plaintiff's decedent; it is *held* that the language of the claim in suit is too general, indefinite and unsupported by details to have put the Commissioner on notice that plaintiff desired the assets involved to be revalued. *Id.*

XXI. (21) Where it is found that the income in the instant case was income distributed to plaintiff under discretionary power lodged in the trustees by the provisions of a trust of which plaintiff was the principal beneficiary; it is *held* that such income was taxable to plaintiff under the provisions of section 162 (c) of the Revenue Act of 1934, which provides that income "which, in

TAXES—Continued.

Floor Stocks Tax—Continued.

XXVIII. (2) Where during the year 1933 floor stocks taxes on cotton bags on hand as of August 1, 1933, were paid by plaintiff in accordance with the provisions of the Agricultural Adjustment Act (48 Stat. 31, 35); and where it is shown by the evidence adduced that plaintiff in the ordinary course of his business absorbed said taxes, and that said cotton bags were not sold but were furnished to plaintiff's customers as containers for sugar sold; it is *held* that plaintiff is entitled to recover under the provisions of the Revenue Act of 1936, section 902 (49 Stat. 1648, 1747). *Id.*

XXIX. (3) Where on June 29, 1937, plaintiff filed claim for refund of floor stocks taxes paid in 1933 and 1934 under the Agricultural Adjustment Act (48 Stat. 31) and under the Jones-Costigan Act amendatory thereto (48 Stat. 670); and where said claim for refund was held by the Commissioner of Internal Revenue to be insufficient; and where, later, on January 12, 1938, plaintiff filed additional facts and schedules as required by the Commissioner by letter dated December 29, 1937; and where such claim for refund was rejected on its merits by the Commissioner on January 29, 1938; it is *held* that the claim was timely filed, in accordance with the provisions of section 903 of the Revenue Act of 1936 (49 Stat. 1648, 1747) and of Section 405 of the Revenue Act of 1939 (53 Stat. 862, 884) extending the time for filing claims from July 1, 1937, to January 1, 1940. *Id.*

XXX. (4) Evidence *held* insufficient to show taxpayer had not passed on tax. *Insular Sugar Refining Corp.*, 345.

XXXI. (5) A showing that claimant sold its floor stocks sugar at prices less than the market value thereof as of June 7, 1934, the day prior to the effective date of the floor stocks tax, plus the tax, is insufficient to show that claimant bore the burden of the tax. *United States* v. *Cheek*, 126 F. (2d) 1; *Colonial Milling Co.* v. *Commissioner*, 132 F. (2d) 505, cited. *Cones* v. *United States*, 123 F. (2d) 530, distinguished. *Id.*

TAXES—Continued.

Transportation of Oil—Continued.

although, for the same charge, they also performed more extensive services, if their customers called for them; it is *held* that the determination of the Commissioner was reasonable and plaintiff is not entitled to recover. *Id.*

XXXVI. (3) Under the statute (47 Stat. 169, 275) the question for the Commissioner was not whether, under the provisions of clause (3) of subdivision (b) of Section 731, the charges of certain other pipe line companies were reasonable for the kind of services rendered by plaintiff; but the question was whether said companies did, at arm's length, charge such rates for services "like" those of plaintiff, as provided in clause (2) of subdivision (b); and the Commissioner's inquiry ended there. *Id.*

XXXVII. (4) The Commissioner did not exceed his power in determining that the services of other pipe line companies were "like services" to those of plaintiff and that plaintiff's tax should be computed on the rates so charged by said companies. *Id.*

Lubricating Oils.

XXXVIII. (1) Cutting oils manufactured or compounded for use in the cutting of metals, are *held* to be lubricating oils and accordingly subject to the tax imposed upon lubricating oils under section 601 (c) (1) of the Revenue Act of 1932, and the pertinent Treasury Regulations (Regulation 44, Article 11). 47 Stat. 259; U. S. Code, Title 26, section 3413. *Sea Gull Lubricants,* 716.

XXXIX. (2) In the process of metal cutting the use of an oil substance to prevent adhesion between cutting tool and the metal to be cut is a process of lubrication. *Id.*

XL. (3) It cannot be supposed that Congress, when it imposed a tax on lubricating oils, did not intend to tax oils which the makers advertised as lubricating oils and sold as such; and which are generally referred to in the trade as lubricating oils. *Id.*

XLI. (4) The fact that cutting oils are ordinarily sold at a very much lower price than some lubricating oils, not cutting oils, does not make the tax discriminatory when other lubricating oils sell for as little, or almost as little, as some cutting oils. *Id.*

WORDS AND PHRASES

SUPPLEMENTARY INDEX

Volumes 90 to 99, Inclusive

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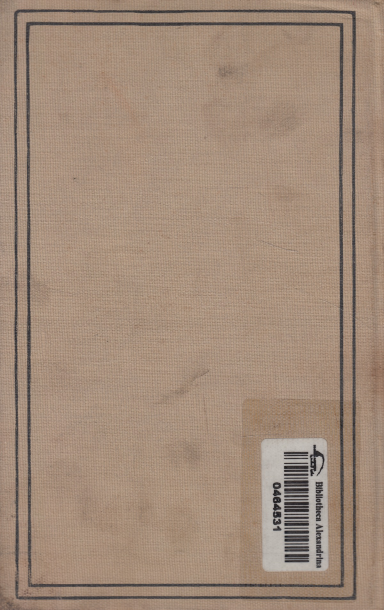
Index of cases in the Court of Claims, in which opinions were delivered, reported in volumes 90–99, both inclusive; and of cases originating in the Court of Claims which were reviewed by the Supreme Court of the United States, and cases in which review was denied.

[NOTE.—A consolidated index, covering volumes 1 to 89, inclusive (1863 to 1939), was published in volume 89; being a consolidation of previous indexes—volumes 54 and 62—with corrections, and the addition of subsequent cases, up to and including decisions delivered December 3, 1939.

This index is accordingly supplementary to the Consolidated Index, volume 89, and includes cases in which opinions were delivered up to and including September 30, 1943.]

Symbols to indicate action of the Supreme Court are used as follows:

- a =affirmed.
- am=affirmed; modified.
- ar =affirmed in part; reversed in part.
- g =certiorari petition granted.
- d =certiorari petition denied.
- di =certiorari petition dismissed.
- r =reversed.
- rd =rehearing denied.
- rg =rehearing granted.
- v =vacated.


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